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THE

NATURE AND DESCENT

OF

ANCIENT PEERAGES,

CONNECTED WITH

THE STATE OF SCOTLAND,

THE ORIGIN OF TENURES,

THE SUCCESSION OF FIEFS,

AND THE

CONSTITUTION OF PARLIAMENT,

IN THAT COUNTRY:

A DISCOURSE

ADDRESSED TO THE

RT. HON. WILLIAM EARL OF MANSFIELD,

LORD CHIEF JUSTICE OF ENGLAND.

BY

GEORGE WALLACE, Esq; ADVOCATE, F.R.S.E.

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WITH ADDITIONS AND CORRECTIONS.

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Page 27. Note (*i*), line 7. for *ſixth; more*, read *ſixth, more.* —P. 46. l. 13. for *exempted* r. *exempt.*—P. 84. l. 16. for *uſe* r. *poſſeſs.* — P. 84. l. 17. for *poſſeſs* r. *uſe.* — P. 228. l. 2. for *ſenſe, and* r. *ſenſe and*—P. 343. l. 3. for *exhorbitant* r. *exorbitant.*—P. 438. l. 17. for *ſafer* r. *ſafe.*—Dele *even.*—P. 468. l. 12. for *pierces* r. *pierce.*—P. 482. l. 6. dele *even.*

TO THE

RIGHT HONOURABLE

THE

EARL OF MANSFIELD.

PROFOUND or abſtract reſearches, requiring much intenſe and continued thought, fatigue and overwhelm vulgar minds: Speculations, leſs remote from common apprehenſion, often, either from their apparent minuteneſs, or from their ſeeming inſignificance, carry an unpromiſing and meagre air: And both ſorts, unengaging except to a few, and diſreliſhed by the multitude, amidſt diſſipation and prejudice frequently meet with a cold reception in the world. Amidſt theſe formidable diſcouragements, the numerous claims lately entered to ancient Scotch Peerages, and the many queſtions agitated concerning their legal deſcent, have engaged me, my Lord, to venture on compoſing a diſcourſe

on that important article of public jurisprudence. A cursory view, which I was occasionally called to take of this matter, led me to suspect, that, in treating it, a due attention had not hitherto been bestowed either on the constitution of parliament or on the nature of honours, in Scotland. It is reasonable to suppose that both would have some influence in regulating the descent of nobility: A fuller recollection brought me to believe, that this influence must have been considerable: And I thought it highly probable, that modern lawyers, forgetful of the ancient state of North Britain, had here been led into errors, both in their arguments and in their opinions, by ideas prevalent at present in both kingdoms; which, however just in themselves, cannot be applied to the objects in question. The hints, which had gradually suggested themselves to my mind, the magnitude of the business to which they relate excited me to prosecute; and having at last formed something that approached towards a system, I determined not to delay executing a design I had long entertained of submitting to your Lordship the result of my inquiry.

The view I exhibit of the dignities of Scotland will probably appear new, and my principles may be hastily rejected by others on that account. But observations which might justly be reckoned trite,

even

even such as had been anticipated by former writers, should form an entertainment altogether unworthy of being presented to the Earl of Mansfield. The novelty of those produced in the sequel, if they be in any degree possessed of that quality, it would, my Lord, be affectation to conceal, is the very circumstance that principally emboldens me to esteem them not improper to be laid before a leading member of that august tribunal, which is frequently called, in delivering advice to the Crown, to judge of pretensions to honours; and, I am certain, will not alone render them unacceptable to your Lordship's superior ingenuity. Your liberal turn and enlarged understanding permit not your mind, in any case, to decide in an unphilosophical and precipitate manner. I flatter myself that you will attend to the facts submitted to your consideration, will examine the proofs offered of their truth, will scrutinize the reasoning founded on both; and allow me to add, that you will acquiesce in any of the following conclusions which you may find accurately deduced from premisses properly established.

In some cases, a book from its own nature cannot be rendered, without the utmost art, agreeable both to delicate tastes and to correct judgements; and authors, in order to gain an exten-

five audience to their works, are ſometimes ſeduced to ſeek after entertaining embelliſhments more than is entirely conſiſtent with that ſtrict propriety which a juſt criticiſm demands in every literary production; but, after having beſtowed infinite pains to prepare for the public uſeful compoſitions, inſtead of reputation, they do not rarely meet with mortification or diſappointment.

Contents propoſed.

A diſſertation, precipitately imagined to conſiſt only of vain genealogies and of dry diſputations, will hardly be ſuppoſed, by ſuch as, without condeſcending to peruſe it, allow themſelves the unjuſt liberty of pronouncing raſhly by anticipation on its contents, to deſerve the notice of philoſophers and of politicians; and, if ever, muſt commonly be late of overcoming the prejudice apt to be inſpired againſt it by its title. But quick piercing ſpirits, inventive and fertile, like your Lordſhip, are able, by a glance of thought, almoſt intuitively to deſcry, that deep and intereſting queſtions, hid from dull and phlegmatic minds, may ſometimes be extracted out of matters ſeemingly barren; and our ſubject will perhaps be ultimately found, in general obſervations and in extenſive diſquiſitions, to be ſuſceptible of greater variety than it may at firſt be perceived to admit. In the examples ſelected for illuſtrating my theory, it will perhaps be poſſible to

in-

interweave many of the principal paſſages of the Scotch hiſtory, as well as various anecdotes concerning private men, whom the preſent and the laſt age beheld ſuſtaining diſtinguiſhed characters in life. The ſtate of a country, and the manners of its inhabitants, are intimately connected with almoſt every inſtitution eſtabliſhed in it: Accounts of them are always amuſing, and even inſtructive: And in proſecuting my inquiry, I ſhall be obliged to give ſome proſpect of the ancient condition of Scotland, its lands, its agriculture, its trade, its people. Clanſhip, juriſdiction, fiefs, and tenures, which will be ſhown to have in all probability originated there from the barbariſm of its inhabitants, will alſo be diſcovered to have led naturally to the introduction of honours among them. Dignities, which are territorial, will appear to have been more ancient than thoſe which are perſonal: The connection, maintained by them with parliament, will be explained: Their nature, its conſtitution, and the changes undergone by both, will gradually diſcloſe themſelves: In the progreſs of my diſcourſe opportunities will be afforded of ſuggeſting hints concerning ſeveral articles of public law, a branch very magnificent, but little known; and through a long avenue you ſhall be conducted, from the rudeneſs in which the Scots and

their country continued long to be involved, to the cultivated and happier period in which both nations were at laſt incorporated into one great and improved kingdom.

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THE

NATURE AND DESCENT OF ANCIENT PEERAGES.

BOOK I.

PART I.

Nature of TERRITORIAL HONOURS before the Year 1587.

SECTION I.

A Proſpect of the Ancient State of Scotland.

ACQUAINTANCE, rendering intercourſe eaſy and agreeable, begets an affection, between perſons cemented by it. The ſame objects, being familiar or known to people united in that manner, are conceived and recollected by them with facility and with clearneſs. The

ſtrength and the vivacity, with which their conceptions of each other, and of the things mutually related to them, are marked, cauſe their image, in conſequence of the rules that reſtrain the changeableneſs of thought, to return frequently into memory, and a joy is impreſſed on the heart both by their remembrance and by their preſence. Even the places, in which thoſe pleaſing intimacies were contracted, or our early years have been ſpent, are regarded by us with fondneſs; and the attachment, experienced here to flow from cuſtom, and from the livelineſs of our perceptions, expands itſelf by degrees, as we advance in life, as our ideas enlarge, and as the circle, in which we move, extends. Hence a partiality is gradually formed within us in favour of our country. A man finds himſelf there among perſons whom he loves; and imagining thoſe by whom he is ſurrounded to be well affected towards him, he relies in it for protection. A ſtranger, in other lands, he does not believe himſelf equally ſafe from injury. The excellencies enjoyed by them, if they poſſeſs any, as well as themſelves and their inhabitants, are either altogether unknown to him, or deſcried obſcurely through reports conveyed from a diſtance; an advantage peculiar to that ſpot, which is rendered dear by nativity, by education, and by reſidence.

dence. Regions, inhoſpitable and dreary, at which an Italian would ſhudder, want not charms in the eyes of thoſe born in them; and in weak ignorant narrow minds, this prejudice is commonly ſtrengthened by its very falſity, or by the oppoſition made to entertaining it from the ſlenderneſs of its foundation. Thoſe, who have been born or who live in any country, become inſenſible, or perhaps are gradually reconciled by habit, to its deformities and to their own. Hence reflections, caſt either on it or on them, are ſeldom heard without emotion, unleſs they be couched in terms which expreſs good-will, or at leaſt whoſe delicacy muſt prevent offence.

A man, however, ſincerely attached to truth, ought to diveſt his mind of all prejudices. Rome, the miſtreſs of the world and the ſeat of arts, was at firſt a collection of huts and a receptacle of banditti: Provinces, now loaded with oranges, with citrons, and with vines, were once covered with briars, with crabs, and with ſloes: And ſavages, who roamed naked in the woods, who dwelt in caves and in the clefts of trees, and who ſubſiſted on the ſpontaneous fruits of the earth (*a*), were at laſt transformed into the moſt learned, the moſt philoſophical, and the moſt poliſhed race of antiquity. All nations, except perhaps colonies, have

(*a*) Pauſanias.

have ſprung from low as well as obſcure beginnings: And it is both a pernicious and a ſilly conceit which bluſhes to recollect their grovelling origin. A numerous ſociety cannot be expected, more than a ſingle individual who is perfectly ſatisfied with his condition, to make any vigorous exertions towards delivering themſelves from a wretchedneſs of which they are wholly inſenſible; and improvement commonly proceeds ſlowly even among thoſe who perceive that they require it, unleſs they be ſtimulated to activity by rewards or by ſhame. Hence much pains and a glowing eloquence have often been employed by genuine patriots (*b*) on expoſing to general view the real ſituation of the great community with which they are connected by citizenſhip; and a benevolent man, on a retroſpective compariſon, muſt here feel a ſentiment of gratitude ariſe in his breaſt to thoſe by whoſe liberal expoſitions his country has been delivered from its primitive diſtreſſes. A nation, which affords the proſpect from the caſtle of Stirling, from the caſtle of Edinburgh, or from the hill of Beith; which can boaſt of the ingenuity, the induſtry, and the manufactures of Paiſley, of Greenock, and of Glaſgow; and which produced Buchanan, Napier, Thomſon, Hume; needs not be aſhamed of either the bleakneſs in which its

(*b*) Fletcher, Forbes, &c.

its lands or the groſſneſs in which its inhabitants were found in the days of Kenneth or of Caracalla. No region can be exempt from the influence of thoſe laws, to which its geographical poſition or its ſuperficial conſtruction ſubjects it. In ancient ages ignorance and ferocity were widely diffuſed over all the north: and in the natural and the political ſtate of Scotland it is perhaps poſſible to diſcover cauſes, both phyſical and moral, which might originally produce ſavageneſs, and greatly retard improvement, among the people who lived in it.

Climate of Scotland.

Heat, which relaxes the fibres, which diſſolves the ſolids, and which promotes ſweat, weakening the body, waſting its ſubſtance, and exhauſting the ſpirits, begets an averſion to labour, and an inability to endure it: But a kindly climate, a rich ſoil, and genial warmth, ſupplying by their native energy abundance of luxuries as well as of conveniencies, thoſe bleſſed with them, not being impelled by neceſſity, can be ſtimulated to toil only by a paſſion for novelty and a taſte for variety, which, by new objects exciting the ſoul, preventing ſatiety, and relieving both, adds a livelineſs and a reliſh to every enjoyment. Accordingly enterpriſe, as well as navigation, have almoſt conſtantly directed their courſe towards the equator: A commerce comparatively little has

has ever proceeded from the line towards the poles; and the countries ſituated between the tropics or near them, rarely engaging in diſtant voyages or in toilſome adventures, have moſtly contented themſelves, both in modern and in ancient times, with a very limited interchange of their mutual ſuperfluities. In hot climates, and even in ſultry weather, men are indolent and torpid: Thoſe, who feel no wants, or whoſe deſires are ſatisfied, not being moved to exertion by any violent impulſe, remain at reſt: And the liſtleſsneſs and debility, diffuſed over their nerves, counteract that ardour with which we ſeek after things different from ſuch as repetition and cuſtom have rendered diſagreeable or inſipid.

The ſame inactivity, with which heat is accompanied in the tropical regions, is produced by an oppoſite cauſe in thoſe which approach to either pole. Cold, contracting and hardening all the members of the body, retarding the circulation and diminiſhing the warmth of the blood, ſhutting the pores, and obſtructing perſpiration, deſtroys that fine texture of parts and of courſe that delicate ſenſibility of frame, which, enlivening the imagination, and inflaming the appetites, are among the prime movers that ſtimulate to action. The limbs, ſtiffened by it, reſiſt change, and, loſing their ſuppleneſs, grow unpliant to labour, which

which from their rigidity becomes doubly painful: And much perſpirable matter, which ought to be diſcharged at the orifices allotted for that office, being detained and accumulated in the body, and impeding the play of the organs and the motion of the joints, generates an epidemic ſluggiſhneſs, which checks conſiderably the efforts that an animal endued with reaſon, fond of pleaſure, and ingenious in invention, ſhould otherwiſe make to alleviate by art the diſtreſſes incident to a ſituation naturally unfavourable.

Its Crops.

From the cape of Galloway, in the latitude of fifty-four degrees forty-five minutes, Scotland ſtretches northward to the Windy Knap of Caithneſs, in the fifty-ninth degree; a narrow country, ſurrounded on every quarter, except the ſouth, by the ocean, from which few places in it are diſtant full forty miles. High hills cover a large portion of its ſurface: The piercing winds, the long winters, and the great rains, cauſed by them, are naturally productive, except in ſeaſons exceedingly favourable, of malignant effects on all its crops: And the huſbandman, his hopes blaſted, his nerves ſhaken, his mind irritated, agitated to deſpair, depreſſed in ſpirit, and ſinking under both, might continue long in Drumochtar or at Soutry diſinclined to exertions which were to bring him diſappointment, vexation, and ſorrow.

Every

Every perſon, not deeply infected by prejudice, muſt confeſs, that our lands are far better cultivated and much more fruitful at preſent than they ever were in any preceding century. But draw a line from the caſtle of Dumbarton, along the eaſtern bank of Lough Lowmond, by the foot of the mountains that overlook the plains of Menteith and the ſtewartry of Strathern, winding to the village of Crief and the town of Perth, near the bottom of the Grampians, to the city of Aberdeen or the caſtle of Slains; and you will find a very great part of the grounds, on the north ſide of that boundary, nearly in the ſame ſtate in which probably they were beheld in the ancient days of Fergus. A conſiderable portion of the counties ſouth of it is ſtill extremely bleak or miſerably treated.

Amid many evident ſymptoms of a renovating principle diſplayed by nature in recovering by repoſe its exhauſted vigour, either a ſtupidity, induced by a habit of ſtaring at objects without attending to their connections, did not remark, or an avarice, which often defeats its own end, feared to proceed on the belief of, the vaſt benefit derivable to a poor ſoil from reſting it; and the art of fallowing land was not introduced into Scotland (*c*), till a gentleman, not long dead, happening,

(*c*) Fletcher, Diſcourſe ſecond, p. 107. 108. 109. of edit. printed at Glaſgow in 1749.

ing, on an excurſion into England, to ſee the plough and the harrow going in Summer, inquired the reaſon of a phenomenon whoſe ſtrangeneſs ſurpriſed him. In many places a ſcrupulous averſion is ſtill entertained to that beneficial practice; and it is not without a mighty repugnance that tenants can yet be reſtrained from waſting their farms by tillage much longer than they ought to be continued in it.

Other modes, more obvious and leſs revolting, ſeem not to have been better known among the Scots, or more practiſed by them, than fallow. Either they were ignorant of the advantage of clearing their fields of weeds and of draining them, or from ſloth they beſtowed not a proper attention on theſe important articles.

The inſtruments too, uſed by them in agriculture, from their great debility, and from their unſkilful conſtruction, were long inadequate to performing their offices. Stories, hardly credible, are ſtill current, and aſſerted with authority, about the abſurd and even cruel method in which their cattle were put to the yoke, and their ſervants walked, in plowing and in harrowing.

It is not yet uncommon to pare the ſurface of the earth, to cover cottages with turf, and to burn it for fire. A right to dig turf in grounds belonging to another, a ſervitude unknown to the Ro-

Romans, is familiar in the codes of Scotland (*d*): privileges deſtructive of the richeſt parts of the ſoil.

A tradeſman, who dealt extenſively in corn, was wont, if I forget not, to compute, that about fifty years ago no more than thirty-ſix thouſand bolls of wheat a-year were raiſed in all Scotland. I pretend not to be certain of his numbers, but on examination his computation is leſs improbable than you would at firſt reckon it.

Eaſt Lothian, the Merſe, Teviotdale, and perhaps Fife, or rather the diviſion of Perthſhire named the Carſe of Gowrie, continued long to be almoſt the only ſhires in which that ſpecies formed a common object of huſbandry: And count the chalders which might probably be produced in them. In other counties during the laſt century, and even during a part of the preſent, wheat was ſown in ſmall quantities rather by enterpriſing and vain adventurers in the way of expeſiment and of oſtentation, than by judicious or cautious farmers in the courſe of trade and with a view to profit. I will not ſay north of the Forth, but north of the Tay little is yet grown: In ſome entire provinces, and over very extenſive tracks, you find

(*d*) Craig, de feudis, L. 2. d. 8. § 4. 35.—Stair's Inſtitutions, B. 2. t. 7. § 13.—Macdouall's Inſtitute, B. 2. t. 7. § 31.—Erſkine's Inſtitute, B. 2. t. 9. § 17.

find none, or next to none. Even in the country weſt of Edinburgh, and in one or two counties ſouth of it, wheat was a rarity, on which tenants ſeldom ventured, before the year 1745. All over Scotland the ſtaple product ſtill conſiſts of oats, of barley, or of bear (*e*), and perhaps of peaſe.

In the North the rents of farms always were, and ſtill are, moſtly paid in corn and in proviſions (*f*); and tithes were conſtantly levied or demandable in kind, till the reign of Charles I. But all the wheat, paid at the Reformation to eleven biſhopricks mentioned by Keith, was forty chalders, five bolls, three firlots, and one peck; of which thirty chalders, eight bolls, three firlots, and one peck, were received by St. Andrews alone. None was paid either to the archbiſhop of Glaſgow, to the biſhop of Galloway, to the abbey of Paiſley, to the abbey of Croſregal, to the abbey of Dundrenan, to the abbey of Saulſeat, to the priory of Whitehorn, or to the priory of Leſmahago: And if a little was drawn by ſome in which one ſhould not expect it, you will remember that lands and tithes and pariſhes were often annexed to cathedral churches ſituated at

(*e*) Winter or ſquare barley—Art. 6. of the Treaty of Union. (*f*) Fletcher, p. 108.

great diſtances from them. For inſtance, four chalders were paid to the biſhop of Dunkeld: But his dioceſe comprehended the carſe of Gowrie and a part of Lothian; and the barony of Aberlady compoſed a part of the patrimony belonging to his ſee (*g*).

Men of letters, not being deprived of nerves and palates and vanity, are not leſs addicted to the delights of ſenſe, and ſometimes purſue the pleaſures of the table, perhaps with more avidity, and even with greater meanneſs, than others. In the revenue of the biſhop of Aberdeen, you will obſerve a hundred and nineteen dozen of poultry, ſixty-five and a half dozen of capons, nineteen dozen of moorfowl, fifty-five geeſe, and ſeventeen ſwine. But the whole wheat, payable to all the biſhopricks, abbeys, priories, nunneries, and provoſtries in Scotland, according to Keith, amounted at the reformation only to three hundred and twenty-four chalders, ſeven bolls, one firlot, one peck and a half (*h*). It is not eaſy to aſcertain with exactneſs the proportion borne by that quantity to the total product of the kingdom. The clergy paid about a half of the taxes laid on property:

(*g*) Forbes on Tithes, p. 76. 77. 78.—Spotſwood's hiſtory, p. 98. of the edition printed at London in 1677.—His Appendix, p. 4.

(*h*) Keith's Hiſtory, append. p. 180.

perty: They were poſſeſſed of at leaſt a third, others ſay a half, of the whole land in the country: They had alſo a right to the tithes; and you can hardly ſuppoſe that they would be contented with leſs than a third of the fineſt grain which grew on their eſtate. On this ſuppoſition, the whole wheat raiſed on their grounds amounted to nine hundred and ſixty-three chalders, ſix bolls, and half a peck; and as thoſe chalders included the tithes, and it is highly probable that wheat was more cultivated among their tenants than among the poſſeſſors of other farms, perhaps a little more than double that quantity, or one thouſand nine hundred and twenty-ſix chalders, twelve bolls, and a peck, is not much leſs than the whole then produced in Scotland (*i*).

(*i*) In the reign of James VI. a third of all the eccleſiaſtical benefices in the kingdom was aſſumed by government * to form a proviſion for the preachers of the reformation; and the third of the wheat amounted the firſt year to a hundred and twenty-three chalders, two firlots, one peck and a third, that is, fourteen chalders, fourteen bolls, two pecks and a ſixth; more than a third of the whole wheat payable to all the biſhoprics, abbeys, priories, nunneries, and provoſtries mentioned in Keith; a difference, which ſeems a little to ſupport our former computation,

* Parl. 1567. c. 10. of the old edition commonly diſtinguiſhed under the name of the *Black Acts*.

A writer, who avails himſelf of every circumſtance which will elucidate his ſubject, by citing facts apparently ludicrous may ſometimes expoſe himſelf to the deriſion of people unable to perceive their force in evidence. Among the Scots *the land of cakes* ſtill is a common toaſt, correſponding to the land of potatoes among the Iriſh. The metaphor, employed in that characteriſtical deſcription, would not originally be taken from the worſt and the rareſt grain produced in the country.

Victual, a word by which in England they mean food, in Scotch ſignifies corn, and by corn the peaſants underſtand oats.

It is not long ſince oaten bread was commonly uſed there in the beſt families; an œconomy ſtill continued in many: This ſort is dignified with an appellative almoſt excluſively appropriated to expreſſing it: And among the commons few are yet able to afford *cakes*. The bread moſtly eaten by them is baked of meal made from peaſe or bear or a mixture of both, and is peculiarly diſtinguiſhed by the name of *bannocs*. In Clydeſdale,

putation, as a ſurplus is thereby created to anſwer for the tithes of thoſe pariſhes which were annexed to the dignified clergy. Perhaps the foregoing calculations are too low: But multiply by ſix, or even by ten, and you will not produce a great quantity.

dale, I think, wheaten is termed *bun* (*k*); a proof of its rarity and of its eſtimation. You find it, as well as mainbread and gingerbread, enumerated by Pitſcottie (*l*) among the delicacies preſented at an entertainment provided by the Earl of Athole for James V.

Major, a preceptor of that prince, remarks, that wheat is not produced in every part of Britain; and adds, that many of the commons eat bread made of bear or of oats. His obſervation is not limited, but probably he had Scotland chiefly in view; and the arguments, with which he adminiſters conſolation to his country, or apologizes for it, are memorable. They uſe bear bread, ſays he, in both Heſperias, in ſeveral provinces of France, and even in the Land of Promiſe: Chriſt and his apoſtles often ate it: A miracle was performed with loaves of barley (*m*).

Boece, who was born in the days of James III. affirms, that wheat is not eaſily reared or proper to be cultivated in Annandale, in Nithſdale, and in Galloway; three of the moſt ſoutherly provinces of Scotland (*n*).

(*k*) A derivative from the French, *Bon.*

(*l*) Hiſtory of Scotland, p. 266. of the edition printed at Glaſgow in 1749. (*m*) L. 1. c. 2.

(*n*) Boet. l. 1. p. 6.

In the reign of James II. every husbandman, who tilled with a plough of seven oxen, was ordered by legislature to sow yearly a firlot of wheat, half a firlot of pease, and forty beans (*o*); a regulation copied from a statute of James I. by which that injunction was laid only on such as plowed with eight oxen (*p*).

In another parliament held by this prince, every man, who from his rank ought to be a labourer (*q*), was ordained either to have half an ox in the plough, or to delve every day seven feet in length and seven feet in breadth; that is, forty-nine square feet; less than a small carpet: a singular, but authentic fact, which conveys a most diminutive idea of the powers of husbandry in those days.

In the time of Alexander II. it appears not to have been unusual to labour the earth without ploughs: Cows, not oxen or horses, seem to have been used in tillage: A husbandman, possessed of more than four, was reckoned rich; and those, who had fewer, were commanded by a statute to work as much ground as they could with their hands and their feet (*r*).

An

(*o*) Parl. 1457. c. 92. (*p*) Parl. 1426. c. 91.

(*q*) Parl. 1424. c. 45. Its words are, "Ilk man of simple estate, that should be of reason a labourer."

(*r*) Stat. Alex. II. c. 1.

An inclination to experiments, which yielded not immediate amuſement, but formed a ſpecies of toil, could hardly pervade men almoſt totally devoid of the love of induſtry; and the people, who in Scotland followed the occupation of farming, were deterred by poverty, as well as prevented by diſtaſte, to make any. In late years indeed a juſter ſpirit, having diffuſed itſelf over the country, has produced a remarkable change in the ſituation of the farmers as well as on the face of their lands: But even in the time of Fletcher the tenants ſeem generally to have been little better than beggars (*s*). Judge therefore of the deplorable ſtate in which they muſt have been in the ancient days of Gregory or of Galgacus. Their houſes miſerable, their leaſes annual, their farms ſmall, their cattle weak, their inſtruments bad, their agriculture wretched; the fruits, extracted from the earth by their feeble efforts, could ſcarcely be ſufficient to ſubſiſt even the few peaſants ſcattered over the fields that bare them. The only counties in Scotland, in which you do not ſtill meet with large moors entirely covered with heath, are Fife, Haddingtonſhire, Linlithgowſhire, and perhaps Roxburghſhire; and even theſe four are by no means completely cleared

(*s*) See Fletcher's ſecond diſcourſe.

of that plant. Situated in a high latitude, everywhere overſpread with mountains, in many regions incapable of tillage, in others ſcratched rather than ſubdued by the plough, ancient Caledonia muſt have been moſtly overgrown with ling (*t*), and in conſequence have produced ſcanty crops of corn. A few oats and a little bear probably compoſed its principal product. Hardly any wheat was raiſed in it: Barley was almoſt wholly unknown: Beans were little uſed: Even peaſe were not much ſown.

A people, ſubſiſted on oats or on peaſe, may poſſibly be no leſs humanized than a people who live on rice or on wheat: But countries, capable of producing rice or wheat, in which little or none is found, muſt be badly cultivated; and that circumſtance, concurring with others like in tendency, muſt be owned to be ſome ſymptom of barbariſm.

Its bogginefs.

Idle and barbarous deſerts generally abound in bogs or moſſes. America, at the landing of Columbus, was covered with ſwamps. The herbage and the graſs, that grow thick during the drought of ſummer round places at which ſprings burſt, wither towards the end of autumn; and the water, mingling with their roots and their leaves mouldered into duſt, and with the ſoil collected about both,

(*t*) Boet. l. 1. p. 13.

both, forms with them a thin mixture of earthy and aqueous particles. Hence is generated by degrees a wet ſpungy black ſcurf, which, from the dry ſubſtances annually added to it, grows continually harder and denſer, till at laſt, in a number of ages, by the flux of the fountains, which are ſeemingly choked, but, diffuſing themſelves laterally, inſinuate their ſtreams ſilently among the ſolids about them, a moſs or bog of turf and of peat is produced, which gradually enlarges its extent and its depth in proportion to the quantity of water, to the inclination of the land, and to the number and the force of the other cauſes that contribute towards creating it, unleſs its growth be checked by cultivation and by man. Moſſes or bogs are ſtill frequent in Scotland; and over a great extent of that country, eſpecially in the uncultivated parts of it, their fuel conſiſts entirely of peat (*u*).

Its paſtures.

Its hilline ſs, as well as its climate, adapts it more for paſture than for corn: But artificial graſſes and green crops, perhaps the moſt valuable improvement made in huſbandry, are inventions extremely modern. Anciently tenants on that account were not ſuffered to plow meadows; a notion, which I dare not aſſert is yet entirely expelled

(*u*) Phil. Tranſact. II. 732.

expelled the imaginations of lawyers (*v*): The parochial clergy, who are entitled in ſome caſes to be allowed in each pariſh ground ſufficient to feed two cows and a horſe, cannot compell that accommodation out of land termed arable (*x*). Even thoſe ſimple methods by which natural paſtures may be rendered both more nutritive and more luxuriant, manure and alternation, were little practiſed there before the union; and the ancient Scots, from ignorance or from pride conceited of their own modes, obtained not for their fields, or for the beaſts which fed in them, that ſhelter and that warmth which art and activity might have procured to both.

Its naked-neſs.

It is chiefly in hedgerows, and in ſmall plantations judiciouſly diſpoſed, that trees afford protection to ground, and produce heat. Extenſive foreſts hindering the rays of the ſun from pervading the ſpace included between their roots, their tops, and their extremities, and cauſing the air to ſtagnate, generate dampneſs and cold; and the natives of a land overgrown with wood muſt generally be very wild. I muſt not however diſguiſe, that Scotland appears of old to have been wholly naked, or extremely open; and we have little

(*v*) Stair, B. 2. t. 9. § 31.—Macdouall, B. 2. t. 9. § 21.—Erſkine.

(*x*) Parl. 1649, c. 45. Parl. 1663. c. 21.

little reaſon to think, that in any age, of which an accurate remembrance is preſerved, this kingdom ever was much more woody than it is now.

The trees which are often found in bogs, and which are ſometimes cited in proof of its woodineſs, prove no more than that particular ſtems once grew in the places near which they are buried. The ſoft ground occupied by the moraſs becoming at laſt unable to ſuſtain their weight, any, which grew on it before the marſh loſt its ſolidity, could not but fall; and in proceſs of time the earth, ſwelling, roſe above them. Hence, from an error not uncommon of miſtaking the effect for the cauſe, they are ſometimes imagined to have ſunk into it: but they do not eſtabliſh, that either Scotland in general, or any wide track of it, was ever clothed all over with wood.

Its nakedneſs muſt ſtrike a man, whoſe time has been paſſed among the ſtately aſhes, the noble elms, and the venerable oaks, which embelliſh the plains of Surrey, of Middleſex, and of Kent; and a celebrated traveller was thence led haſtily to affirm, that on a hardy tour performed by him from the Thames to the Hebrides, he met with little or no timber north of the Tweed. A region, in which large trees were rare ſpectacles in the days of his Majeſty, could not be woody in thoſe of Macalpin. Perhaps in the valleys, or on the

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the banks of rivers, and in places defended from the eaſt, a few buſhes might grow wild; but the tops and the ſides of mountains, the heights of Shehallian and the peak of Ben Nevis, ſeem not, in a narrow country every where bordering on the German ocean, to be either a ſoil or a climate hoſpitable to the growth of trees.

In few places can they yet be reared without great attention, and in ſome the utmoſt care has hitherto been unable to protect them: Shall we ſuppoſe, that, under circumſtances leſs propitious, they poſſeſſed ſtrength of themſelves ſufficient, amidſt a total neglect, to overcome the hardſhips with which, in ages ſtill ruder, their tender fibres had to contend?

Every man, whoſe eſtate extended to a hundred pounds of yearly rent (*y*), was charged by an act (*z*) paſſed in the reign of James V. to encloſe three acres of ground, and to cauſe his tenants to plant one tree for each marc rented by them.

In that of James IV. parliament directed woods to

(*y*) At preſent Scotch money is to Sterling money in the proportion of 1 to 12. A penny Scotch is the twelfth part of a penny Sterling; a penny Sterling is a ſhilling Scotch; and one ſhilling and eight pence Sterling make a pound Scotch. But the proportion varied in different reigns. See Ruddiman's Preface to Anderſon's Diplomata.

(*z*) Parl. 1535. c. 10. 11.

to be planted, and penalties were inflicted on thoſe who deſtroyed them (*a*); injunctions which agree not to lands, like America, covered with foreſts that muſt be cleared.

Aſcend to James II. and you find in 1457, as well as in 1535, not only hedges ordered to be made, but broom commanded to be ſown. That ſhrub was ſtill protected by ſtatute in the time of James VI. (*b*)

Ila, a fertile iſland, abounds, ſays Boece (*c*), with mines of metal, which might be turned to good account, did not the ſcarcity of wood prevent the working of them.

In the days of James I. perſons who ſtole green wood, or who pulled the bark off trees, were declared indictable for the offence before the juſticiary (*d*); and ſpears, ſhafts, bows, and ſtaves, a part of the armour of the age, were obliged to be imported from countries beyond the ſea (*e*).

Æneas Silvius, who under the title of Pius II. gained by the unanimous voice of all the cardinals the higheſt prize of theological ambition, before he aſcended the papal throne had executed under Eugene IV. a commiſſion of legate in Scotland.

(*a*) Parl. 1503. c. 106. 109. Parl. 1579. c. 18.
(*b*) Parl. 1457. c. 91.
(*c*) Boet. l. 1. p. 14.
(*d*) Parl. 1424. c. 36. 37. Parl. 1471. c. 56.
(*e*) Parl. 1425. c. 52.

land. Amidſt an uninterrupted ſucceſſion both of important buſineſs and of flattering diſtinctions accumulated on his ſplendid talents, a lively reliſh never allowed him to neglect his literary purſuits. In his hiſtory, that curious obſerver affirms, that this country was then entirely naked of wood (*f*).

Fanciful conjectures and ingenious hypotheſes ought always to yield to expreſs teſtimony and to authentic facts, which here, the more accurately they are examined, are conſtantly found more and more conſiſtent, and unanimous, as well as agreeable to a juſt philoſophy. Some writers indeed ſpeak of woods in Scotland, and make particular mention of the Caledonian foreſt; but I have met with no author who affirms, that he ſaw it, or even that the country was woody, in his days. In Marre, in Strathſpey, in Badenoch, in Stratherrick, in Strathglaſs, are ſtill found woods of fir and of birch, which, ſowing and planting and weeding themſelves, ſeem to be old; and it is highly probable, that in different places ſimilar plantations might be ſcattered over the kingdom

(*f*) Pauperes pene nudos ad templa mendicantes, acceptis lapidibus eleemoſynæ gratia datis, lætos abiiſſe conſpeximus. Id genus lapidis, ſive ſulphurea ſive alia pingui materia præditum, pro ligno, quo regio nuda eſt, comburitur. De Europa, c. 46.

kingdom at conſiderable diſtances in ancient ages: But if the land had ever been covered with trees in a degree much greater than at preſent, a cauſe muſt have exiſted, yet none is diſcoverable in record, which produced the remarkable bareneſs now viſible on its ſurface.

A people, who knew not to plow the ground, to ſtraighten a furrow, to form a ridge, or to improve their paſtures, could not be ſkilful in horticulture; an art, in itſelf complicated from the variety of its objects, which cannot be carried to any perfection without nice obſervations as well as an enlarged experience. A ſour cale, fitter for ſwine than for men, continued long to be the only cabbage boiled in the pots of Scotland, and perhaps their common ſoup took its denomination from that rancid ingredient. Other greens were hardly known to the Scots, or extremely rare among them. Their principal root was the white parſnip. At the Revolution hardly a garden, except that belonging to Heriot's hoſpital, was found nearer Edinburgh than Muſſelburgh or Inverek: The produce of theſe villages, having long been in almoſt an excluſive poſſeſſion of the market, ſtill retains a ſuperior reputation among old people: And a full century is not paſſed ſince the capital was ſupplied with onions from Flanders or from Holland (*g*). Little, therefore, as well as bad

Its gardens.

(*g*) Parl. 1672. c. 5.—Parl. 1686. c. 24.

bad, ſtuff muſt anciently have been raiſed in the Scotch gardens; and we cannot reaſonably ſuppoſe, that, in the days of William the Lion, or even of Robert III. any vegetables, which ſhould now be eſteemed, were produced in them.

Food. No doubt, life may be paſſed comfortably without delicacies: Cuſtom renders men greatly inſenſible to the want even of conveniences. A perſon, who looks about him, will diſcover neceſſaries themſelves to be not an abſolute and a comprehenſive, but a relative and a limited term, variable in its objects with rank and with habit; and little more than coarſe aliment ſeems long to have been underſtood by the expreſſion both at Lacedæmon and in Scotland. It is almoſt impoſſible to believe, that the name, affixed to a ſort much eaten here, was originally derived from the Greek; yet the appellative, by which that diſh is diſtinguiſhed in Scotch, agrees almoſt exactly both in letters and in ſound with the generic term (*h*) which ſignified meat at Sparta; an amuſing coincidence. Perhaps, two thirds of all the Scots are ſtill, or at leaſt till the introduction of potatoes were, principally ſubſiſted on boiled water thickened with peaſe-meal or with oat-meal (*i*); a pudding which, according to the

(*h*) Βρωσις. (*i*) See A Diſſertation on the Numbers of Mankind, p. 293.

mode of cookery employed in dreſſing it, is denominated either broſe or porridge.

In every region the number of inhabitants is conſtantly proportionable to the plenty and the cheapneſs of proviſions. The nations, therefore, in which, without agriculture and without paſturage, mankind are ſuppoſed to have maintained themſelves by hunting, muſt always have been thin of people, as wild beaſts and wild birds, from the ſwiftneſs of their flight, are not eaſily taken or killed. A period, indeed, can hardly be imagined ever to have exiſted, in which men depended for their ſubſiſtence either entirely or chiefly on their dogs and on their arrows, or even on their nets and on their guns. Domeſtic or tame creatures, which can be caught with certainty and without trouble, are reared by nature in almoſt every clime; and people, who had once conquered the ſcruple not unnatural to entertain againſt animal food, would prefer beef, mutton, veal, lamb, geeſe, ducks, and fowls, to other ſpecies. It will however be confeſſed, that countries, in which cows, ſheep, hogs, and poultry abound, but in which the commons ſeldom taſte fleſh, involved in idleneſs and in poverty, cannot be far advanced in the arts of life.

Philoſophers, by whom felicity is defined "a ſtate in which the mind feels no uneaſineſs," in Clothes.

eſtimating its quantity examine the internal effects which muſt neceſſarily or probably be produced by the objects or the cauſes that operate in life; but politicians, who aſpire not to views equally ſublime, pronounce on the happineſs of a nation from the plenty and the ſecurity enjoyed by the bulk of its citizens. It cannot be pretended, that the Scots were either better clothed or better lodged, more than better fed, before, than they have been ſince the Revolution. A great proportion of all the commons, eſpecially of the boys and of the women, are ſtill beheld there, even among thoſe who live in towns, without ſtockings and without ſhoes: But a man, whoſe ſympathetic imagination transfers to others the lively feelings excited by their exterior appearance in his own breaſt, muſt be melted into pity, as well as filled with aſtoniſhment, to ſee in the provinces the creatures, unqueſtionably poor and ſeemingly miſerable, who, without ſhirts, without breeches, their heads bare, their clothes tattered, preſent themſelves almoſt wholly naked and apparently ſtarved, to travellers who paſs the hovels, built of turf, out of which they pop to implore alms.

Furniture

A correſpondent pace is commonly obſerved in every nation by all the arts that bear any affinity to each other: And a few genuine remains of ancient

cient workmanſhip, which, defended from de- Arts.
ſtruction by frugality, by admiration, by vanity, by learning, or by accident, have reached our times; proofs leſs deceitful and more ſatisfactory than looſe epithets or indiſtinct deſcriptions given even by contemporary writers, whoſe ideas are uſually bounded by their opportunities; lead unprejudiced judges, who inſpect them with care, to form a very mean opinion both of the dexterity and of the taſte of our old artizans. A family cannot be agreeably ſerved without a variety of moveables: But our anceſtors had almoſt none in their chambers; their kitchens were poorly accommodated with utenſils; themſelves too were moſtly crowded into one apartment; and the little furniture poſſeſſed by them was extremely coarſe or very ſimple: Timber trenchers, wooden veſſels, horn ſpoons; all their implements were nearly alike in ſubſtance and in conſtruction; and the ſmallneſs of their number did not always admit of that diſtance or ſeparation which is eſſential to cleanlineſs or required by delicacy. The ſeats, found in ſome inferior houſes, whoſe maſters either want inclination or are unable to diſmiſs the antique looms left by their fathers, incommodious and clumſy, cannot be moved without difficulty; and from their heavineſs one would almoſt imagine that the people, for whom they

had originally been made, either were much ſtronger than their poſterity, (a ſuppoſition rendered not at all probable by an accurate compariſon of the nutritive powers of the different viands peculiar to each age); or were not incident to that nicety, which, connected with naſty ideas (*k*), impells the preſent generation to be inceſſantly ſweeping and waſhing their floors. A venerable relic, in which Sir William Wallace was wont to ſit, is preſerved in an old houſe in Lanerkſhire. Another chair, the property of Randolf earl of Murray, remains entire at his caſtle of Darnaway. Both pieces, eſpecially the former, are clumſy workmanſhip. On a ſhort excurſion, which I made in 1769 in company with my accompliſhed friend General Fletcher (*l*), we found a bed, which had belonged to James VI. degraded into part of the furniture of an inn at Dunfermline. Strength and perhaps royalty were its only recommendations. Theſe and other ſpecimens, which are ſtill preſerved, ſeem deciſive proofs, that our handicrafts and our manufactures could not anciently be farther advanced than our agriculture and our gardening.

Commerce.

An extenſive commerce, which cannot exiſt without ſubjects of exchange, can rarely be enjoyed long by any wide country, which raiſes not a product within itſelf either from its own ſoil, or

(*k*) Swift's Thoughts. (*l*) Of the 32d.

or out of materials imported from a diſtance; and as Scotland did not imagine itſelf to poſſeſs any ſuperfluities with which it could afford to part, ſo production and induſtry were ſeverely checked there by an abſurd policy, very univerſally prevalent in ancient times. Near three hundred years are gone ſince the diſcovery of America and the eſtabliſhment of the reformation: Free diſquiſition and even philoſophical accuracy have been carried into almoſt every ſubject worthy of them: The eighteenth century is now advancing faſt towards a period: Yet trade is not entirely delivered from the mean jealouſy which has long infected and reſtrained it. Partial diſtinctions are ſtill made between different nations; and inſtead of a liberal ſyſtem, demonſtrative of a diſpoſition equally friendly to all, from which grateful returns might naturally be expected in equitable treatment, hereditary antipathies and an inimical rancour are inflamed and propagated from age to age: Kingdoms, which might live in amity, taught to regard each other with hoſtile eyes, are often involved in ruinous wars: Voluptuous men deprive themſelves of many pleaſures, under a fooliſh idea of depreſſing neighbours whom they fear: And the heavy ſoporiferous inflammatory potions of Portugal are ſtill drunk even in England, inſtead of

the light, the ſprightly, the generous wines of Burgundy and of Bourdeaux. A ſimilar timidity is extended to other articles. The removal of artificers is prohibited by ſtatute (*m*), and plans have been propoſed to prevent emigration; as if the introduction of arts, or the multiplication of mankind, could be ſenſibly retarded, or greatly promoted, in any country in which artiſts are wanted, or there is room for more inhabitants, by unjuſt reſtraints on perſonal liberty. Amidſt the narrow conceptions, which in an enlightened age cramp commercial intercourſe, the Scots could not anciently be exempted from a contractedneſs of view about objects which are yet underſtood perfectly by few. Filled with an apprehenſion, which it is not unnatural at firſt thought to entertain, that ſcarcity and dearth would follow from parting with their commodities; our anceſtors prohibited with anxiety even thoſe, which, if any, formed their ſtaple; cattle (*n*), ſheep (*n*), tallow (*o*), wool (*p*), ſalmon (*p*), herrings (*q*), coal,

(*m*) 5to Georg. I. c. 26.—23tio Geo. II. c. 13.

(*n*) Parl. 1424. c. 23.—Parl. 1451. c. 36.—Parl. 1535. c. 22.—Parl. 1467. c. 31.—Parl. 1581. c. 31.

(*o*) Parl. 1424. c. 35.—Parl. 1483. c. 115.—Parl. 1540. c. 105.—Parl. 1555. c. 14. 19.

(*p*) Parl. 1424. c. 44.—Parl. 1426. c. 86.—Parl. 1581. c. 18.—Parl. 1597. c. 254.

(*q*) Parl. 1424. c. 23.—Parl. 1535. c. 22.

coal(*r*), ſalt (*s*), white-fiſh (*t*), ſkins (*u*); to be exported: Reſtrictions, conformable to the confined maxims aſſumed by them, were laid both on the exportation and on the importation of others (*x*): And a man, acquainted with the native qualities of the Scotch horſe, will ſmile to find, that thoſe ſorry palfreys were not ſuffered to be ſold out of the kingdom (*y*). They perceived not, that regulations, which diſcouraged the raiſing as well as the improving of commodities, tended, in effects directly oppoſite to thoſe expected from them, to produce ſcarcity, and in conſequence to impoveriſh the nation.

The attention, which in the fifteenth century was beſtowed by government on that matter, is a proof, that they had then begun to deal in export. Their dealings, indeed, thoſe who reflect will readily believe, muſt have been extremely inconſiderable. Money, the common meaſure by which things are exactly and eaſily eſtimated, greatly facilitates the interchange of commodities: And much buſineſs can never proceed among a people who want that convenience. The

(*r*) Parl. 1563. c. 20.—Parl. 1579. c. 24.—Parl. 1597. c. 257. (*s*) Parl. 1535. c. 22.—Parl. 1573. c. 56.

(*t*) Parl. 1551. c. 34. (*u*) Parl. 1424. c. 24.—Parl. 1593. c. 182. (*x*) Parl. 1555. c. 14.—Parl. 1578. c. 7.

(*y*) Parl. 1424. c. 23. 34.—Parl. 1567. c. 28.

Romans unqueſtionably brought a military cheſt to the banks of the Tay or to thoſe of the Carron to pay their troops; and from them the Scots might poſſibly learn the uſe of ſpecie, as it is not improbable from the face of the province that they did ſeveral other things. Accordingly Donald the Firſt, a contemporary of Severus who erected the wall that ſtretched from the Tyne to the Eden, two hundred years after Cæſar had made his deſcent on Britain, concluded a peace with that emperor and with his ſon Baſſianus; and Boece reports that he ſtruck pieces of gold and of ſilver (*z*). No Scotch coins however have hitherto been diſ-
1107. covered older than the reign of Alexander I. Hence antiquaries conclude (*a*), that before his acceſſion money had not been coined in his dominions. In fact, in ancient times, penalties, aſſithments, damages, injuries, blows, wounds, fractures, mutilations, murder; all were eſtimated by cattle and by ſheep: And this practice had not been entirely aboliſhed even in the time of James I. (*b*); a ſymptom both of the ſcarcity of our money and of the narrowneſs of our traffic.

Manners. A politeneſs of behaviour is acquired from intercourſe with ſtrangers, in whoſe preſence men wiſhing to maintain a dignity and to render themſelves

(*z*) Boet. l. 5. p. 89.—Buch. l. 4. c. 37. 38.

(*a*) Ruddiman's Preface to Anderſon's Diplomata.

(*b*) Parl. 1429. c. 136.

ſelves agreeable, a reſtraint is impoſed on that coarſeneſs in which people are apt to indulge in the company of their familiars; and in other reſpects, no leſs than in that, foreign trade is a natural ſource of domeſtic improvement. Objects different from any to which they have been uſed, perhaps formed of better materials and on juſter models, are preſented by it to their conſideration: Their views are thereby enlarged; errors in their judgments are corrected; their taſte is reformed by compariſon; and the ſcornful prejudices, which unpoliſhed nations from ſtupidity and from habit generally cheriſh againſt ſtrange manners, are gradually overcome.

In a remote corner of the globe, at a diſtance from the civilized parts of Europe, not acceſſible through a vaſt extent of the country without great difficulty; the inhabitants of North Britain had hardly any opportunities of beholding either materials more proper, or modes more ingenious, or faſhions more elegant, than their own. The impreſſion, therefore, made on their underſtandings by any rare varieties which were preſented to their obſervation, being tranſient and ſhort, was not ſufficiently ſtrong to excite ſpectators to copy them. Ignorant ſepts are commonly remarkable for a conceited ſtubborneſs: And a people, involved in darkneſs, and averſe to labour, cannot

eaſily

eaſily be rouſed to make exertions even towards bettering their condition. You find the diſſonant blaſts of the moſt unmuſical and the moſt harſh of all inſtruments ſtill preſerve with many a preferable reliſh to the livelineſs of the hautboy, the ſweetneſs of the flute, and the ſprightlineſs of the fiddle; and inſtead of the cheerfulneſs of the fife, the majeſty of the horn, or the ſublimity of the trumpet, your ears are often aſſailed even in the ſtreets of the capital with the ſound of the bagpipe. Among the mountains every chief had his piper; and a peculiar habit, imagined to be particularly convenient, was long worn by the mountaineers: But as differences in language, in dreſs, and in forms; objects, which ſtrike the ſenſes, which affect the imagination, and which operate on the paſſions; are immediate cauſes of eſtrangement from thoſe diſcriminated by them; that impolitic diſtinction was wiſely aboliſhed in a late reign (*c*). The tribes, however, affected by the change, were impatient of a prohibition made againſt wearing clothes to which they were attached by cuſtom; their fondneſs was increaſed towards them from oppoſition to a reſtraint, which they aſſerted had been impoſed on their liberty in a matter indifferent or trivial; and in 1782,

(*c*) 19no Geo. II. c. 39.——20mo Geo. II. c. 51.——21mo Geo. II. c. 34.

1782, by a repeal of that ſtatute (*d*), a garb, not remarkable for decency (*e*), was reſtored to its admirers. A conjecture may thence be formed about the oppoſition with which any alteration, that carried an appearance of innovation, would have to contend among their anceſtors, in the days of Achaius.

A people, among whom vaſt multitudes had not clothes to cover their nakedneſs; whoſe lands yielded not proviſions to maintain their inhabitants in fullneſs; whom a lumpiſhneſs, generated by cold, encouraged by example, and confirmed by habit, rendered idle; could not poſſeſs lively perceptions of right, or entertain much reſpect for it. Their conceptions of property, a tranſitory relation in its production and in its diſſolution involved in nice diſtinctions and in juridical ſubtilities, could not but be confuſed and dull. Their ideas of juſtice, and their ſentiments of humanity, infected by the wildneſs (*f*) and the ferocity amidſt which they were generated, were confined in their objects, as well as languid in themſelves: And men pinched in neceſſaries, and ſtimulated by want, could hardly reſiſt temptations by which they were inceſſantly excited to invade the Morals.

(*d*) 22do Geo. III. c. (*e*) Amictu deformis. Fordun, l. 2. c. 9. (*f*) Pitſcottie, p. 27.

the poſſeſſions of their neighbours. A general war was thence declared among them on each other: And facts fully authenticated by record, atteſt, that the manners and the vices, which mark and diſtinguiſh the character and the conduct of barbarians (*g*), maintained an extenſive dominion among the old inhabitants of Caledonia.

Their moveables, conſiſting moſtly of cattle reared by nature on bleak mountains, and ranging at liberty in open heaths, like their hares and their grouſe, tempted continually to depredation. Theft ſeems to have been even preſumed among them by law; a proof of its frequency. A ſuſpicion was very generally entertained that things had not been honeſtly acquired by thoſe poſſeſſed of them: And nobody was permitted to buy any commodity, unleſs the ſeller found a ſurety to warrant it (*h*).

That mean vice was common even among landed gentlemen; and in their caſe, on account of the difficulty of reaching them for puniſhment without cauſing ſomething reſembling an inſurrection, was declared in very modern times to be high treaſon (*i*). In was only in the reign of Queen

(*g*) Fordun, l. 5. c. 47. 49. 53.—l. 6. c. 40.—Boet. l. 1. p. 5. 9.
(*h*) Reg. Maj. I. 18.— Leg. Burg. c. 128.
(*i*) Parl. 1587. c. 50.

Queen Anne that the offence was adjudged by a Britiſh ſtatute (*k*) to be ſimply capital.

In every province, all over the kingdom, ſtated places were appointed, to which ſtolen goods, and the ſureties who had warranted them, were obliged on challenges to be brought, that they might be examined (*l*); regulations, extended to receipt and to robbery.

Honeſt men were obliged to enter into formal treaties with depredators: Peace was commonly ſtipulated from them with a price (*m*): And fifty years are not yet paſt ſince a voluntary tribute termed black mail was thankfully paid by perſons of the firſt rank for ſafety to their families and to their property.

Thoſe, who burned the corn or the houſes of others, or the people in them, were declared guilty of treaſon; a proof of the vindictiveneſs and the fierceneſs of thoſe among whom that crime was common (*n*).

Large eſtates were often acquired by actual conqueſt. Their devoted poſſeſſors were exterminated or expelled by brutal force: And the conquerors maintained poſſeſſion by their ſwords; the

(*k*) 7mo An. ch. 20. (*l*) Reg. Maj. I. 16. 17. 20.

(*m*) Parl. 1567. c. 27.—Parl. 1587. c. 101. 102. 103. 104. —Mackenzie I. 34.—Erſkine B. 4. t. 4. § 64.

(*n*) Parl. 1528. c. 8.—Parl. 1567. c. 41.—7mo An. c. 20.

the only title by which many lands were held till the time of James VI (*o*).

Men were not ſuffered at pleaſure to walk, to travel, or to be out of their houſes, during the night: Their liberty was conſiderably reſtrained in that article. They were allowed to go for a clergyman to a perſon who was ſick, to carry grain to the mill, to proceed on the neceſſary affairs of the king or of their ſuperior, and to purſue goods which had been recently ſtolen or loſt: But even in theſe caſes their deportment was ſubjected to regulation, and they were obliged to preſent themſelves and to notify their buſineſs to two or three witneſſes in the towns through which they paſſed (*p*); precautions, which argue the violent ſuſpicion entertained concerning the dangerous intentions of all who did not keep within doors during that ſeaſon.

It was not lawful to entertain a ſtranger more than one night, unleſs he found a pledge for his behaviour (*q*).

Perhaps, it was an exceſſive delicacy of feeling, or a benevolent anxiety about futurity, which filled our fathers with a perpetual dread of perjury; but they ſeem to have been deeply impreſſed with an apprehenſion, that the ſlendereſt

(*o*) Melvil's memoirs, p. 385. (*p*) Qu. Attach. c. 62.—Leg. Burg. c. 118. (*q*) Qu. Attach. c. 63.—Leg. Burg. c. 90.

ſlendereſt connexion would engage a perſon, called for examination in a ſuit, to ſwear falſely in favour of any party related to him; and a multitude of objections were long allowed in courts of law againſt admitting evidences to give their teſtimony in cauſes. Near relations, hired ſervants, tenants at will, all were deemed incompetent witneſſes; a proof, that thoſe lively views, by which an inviolable reſtraint is now impoſed on men of honour againſt every deviation from truth, were not always believed to poſſeſs a very univerſal or very forcible influence over our anceſtors (*r*).

According to a faſhion not yet obliterated, one, to whom another offers a glaſs of wine or a draught of beer, by addreſſing three words, *pledge you, Sir*, is underſtood to aſk the perſon who offers the liquor to drink before him; a requeſt, that is ſometimes ſuppoſed to have originated from a cuſtom by which in company a man, before drinking, delivered his ſword to his neighbour that he might protect him from violence during the time the veſſel remained at his lips; or perhaps it aroſe from fear of poiſon (*s*).

Even

(*r*) 2 Stat. Rob. I. c. 34.—Mackenzie's Inſtit. B. 4. t. 2. Stair, B. 4. t. 43. § 7. 8. 9.—Macdouall, B. 4. t. 30.—Erſkine, B. 4. t. 2. § 22. 24. 25.—Dict. of Deciſ. title, *Witneſs*. (*s*) Q. Mary's letters to the earl of Bothwell.

Even in the time of James VI. horrid abuſes muſt often have been committed on the confidence natural to repoſe in thoſe into whoſe houſes people are received ſeemingly with hoſpitality; otherwiſe murder, perpetrated under truſt, ſhould not in his reign have been declared treaſon (*t*).

Buchanan affirms it to have been common in his days for lords or chieftains in the wilds of Scotland to put to death their brothers and all their relations, that they might become more ſecure of poſſeſſing their eſtates and of tranſmitting them to their children (*u*): An enormity, which it is in itſelf probable would be, and is accordingly atteſted by ſtatute to have been, more extenſively practiſed in remoter times (*x*).

Our hiſtorians (*y*) aſſert, and our lawyers (*z*) are generally agreed, that a lord of lands was once fully entitled by law to the firſt night of every maiden dwelling in his eſtate, or imported into it by marriage. That cuſtom, however extraordinary, it is difficult to believe did not take place in Scotland; and a perſon, who directs his

1 thought

(*t*) Parl. 1587. c. 51.—Melvil's Memoirs, p. 384.
(*u*) Buch. de jure regni, c. 53. (*x*) Stat. Malc. c. 14.
(*y*) Boet. l. 3. p. 36.—Buch. l. 4. c. 21.—Spotſwood, p. 29.
(*z*) Craig, l. 2. d. 3. § 31.—Skene, *Marcheta*.—Blackſtone, B. 2. ch. 6.

thought to the tyrannical forms of polity, to the nonſenſical ſyſtems of ſuperſtition, or to the audacious expenſiveneſs of both, which have maintained a long and a wide empire over the rational and the bold bipeds who tread the earth, will not poſitively conclude from its extraordinarineſs, that they might not ſubmit alſo to this outrage. The Prince, who introduced it, is particularized (*a*); and the words of the act paſſed by him are preſerved (*b*). In an affair in which a devoted heart is rendered miſerable by participation, men of delicacy would have violently oppoſed its eſtabliſhment: But royalty is commonly irreſiſtible; and Evenus took care not to confine the privilege to the Sovereign. The right was communicated to every proprietor of ground, to whom all who lived in it continued long to be little better than beaſts of burden; and perhaps thoſe, who felt a reluctance, were engaged by its extent to ſubmit to an uſage, of which they hoped the diſagreeableneſs would be leſſened by the pleaſure of retaliation. The facility of victory, and the indifference produced by ſatiety, would however exclude them from the agitation, the ſolicitude, and the ſentiments, which, amidſt courtſhip, uncertainty, and difficulties, adding force and vivacity to the predominant paſſion, compoſe

(*a*) Evenus III. (*b*) Balfour's Practics, p. 678.

a principal part of the refined enjoyments derivable from the elegant affection of love: And a more accurate diſcernment and more delicate taſte, as well as greater probity and ſtricter juſtice, were diſplayed in the formal abrogation of that groſs ordinance. The king, by whom the cuſtom was aboliſhed, is alſo mentioned: The obvention was at laſt made redeemable with money or cows (*c*): And Malcom Canmore fixed a price at which every man might purchaſe to himſelf and to his bride an exemption from that violation (*d*). A clauſe concerning the *marchetæ mulierum* is found in the oldeſt deeds extant. Boece, an hiſtorian, whoſe reputation is not near equal to his merit, not a bit more credulous or more fabulous, and far abler as well as more elegant than Fordun, affirms, that the converſion was exacted and paid among his countrymen in his time; and they are ſtill conveyed in charters granted at preſent.

Intercourſe, familiarity, ſervices, habit, naturally produce a love, an attachment, a friendſhip, a regard, between huſbands and wives, parents and children, relations and kindreds, acquaintance and neighbours, benefactors and thoſe cheriſhed

(*c*) Reg. Maj. l. 4. c. 31. (*d*) Boet. l. 12. p. 268. —Buch. l. 7. c. 21.

riſhed by them; and in every ſtate, however barbarous, you meet with many ſymptoms of much kindneſs among perſons connected by theſe or like ties. No ſociety can poſſibly exiſt, in which all mankind maintain a perpetual war, or even are inſpired with an inveterate enmity againſt each other; and lazineſs of diſpoſition, neglect of agriculture, rudeneſs in art, roughneſs of behaviour, do not alone conſtitute that character. Barbariſm principally conſiſts in a contractedneſs of affection, a hatred of ſtrangers, a prevalence of ignorance, a violation of property, a cruelty of temper, a ferocity of manners: And general deſcriptions given by hiſtorians and by parliament, as well as particular facts authenticated by both, prove, that they maintained of old a wide dominion over the Scots.

Hawthornden, in a picture of the north, whoſe ſtrength cannot diſpleaſe, ſays, That the wildneſs of the ſoil had made the inhabitants there more fierce than fierceneſs itſelf: That James I. on paſſing to the extremity of Murray, ſeemed to have arrived in ſome territory of the Scythians: That he found not many miles from Inverneſs men, of whom ſome had one thouſand, ſome two thouſand robbers at their call, who were accuſtomed to drive prey from their neighbours, killing, ſpoiling, polluting, raviſhing, without any difference

of right or wrong, of holy or profane, but following only their own ravenous and insolent humours; on the quieter sort setting tribute; others compelling to furnish them sustenance and necessaries: The God, the prince, the law, which they obey, being their barbarous chieftains, among whom he was thought the best who transcended most in villany (*e*).

One Macdonald born in Ross, Drummond delineates, a thief fleshed in all murders; mischievous without mercy; equally greedy of blood and of spoil; who by robberies had acquired great riches (*f*).

Features equally harsh mark the portraits drawn by parliament (*g*).

SECT.

(*e*) p. 24. (*f*) p. 28.

(*g*) "Our Sovereign Lord and his three estates convened in this present parliament, considering the wicked inclination of the disordered subjects, inhabitants in some parts of the borders forenent England, and in the Highlands and Isles, delighting in all mischiefs, and most unnaturally and cruelly wasting, herrying, slaying, and destroying their own neighbours and native country people, taking occasion of the least trouble that may occur in the inner parts of the realm, when they think that care and thought of the repressing of their insolence is any wise forgot, to renew their most barbarous cruelties and godless oppressions; For remedy", &c. —Parl. 1587. c. 93. 94. 95. 96. 97. 98.

SECT. II.

Origin of the Authority annexed to Property in Land.

Extreme barbariſm

AMONG a people, whoſe enormities laid legiſlature, even in the reigns of the Jameſes, under a neceſſity to extinguiſh in criminals every hope of pardon, (*b*), the utmoſt exertions of police and of power would be unable fully to protect the retired abodes and the private property either of ſolitary individuals or even of numerous families. Advantages, which offered and were tempting, were conſtantly ſeized, and improved without any relent; and opportunities were eagerly watched of gaining them. Surpriſes and attacks were continually dreaded or expected: And government and laws, by which order, and perhaps morality, are promoted in ſociety, not having attained among them, either from apparent utility or from long eſtabliſhment, the reverence and the vigour without which their influence in reſtraining violence and in maintaining right muſt ever be limited and feeble, private

(*b*) Parl. 1477. c. 88.—Parl. 1483. c. 106. § 4.—Parl. 1503. c. 97.—Parl. 1540. c. 99.—Parl. 1584. c. 12.

perſons were neceſſitated to form among themſelves leagues for obtaining, by their own arms, that protection which the magiſtrate could not enſure to them againſt rapine and invaſion (*i*). Obliged to look for numbers and for ſafety to union and to firmneſs, the weak and the few entered into alliances for their common defence againſt the ſtrong and the many. Hence thoſe aſſociations, which, under different denominations, are very generally found in uncivilized nations, and which, in the mountainous parts of Scotland, ſtill ſubſiſt under the name of Clans.

produced thoſe military aſſociations termed Clans,

The connections, on which theſe confederacies were erected, could not be entirely arbitrary. Inſtitutions, not founded in nature, want ſolidity; and fabrics built on an unſtable foundation cannot be durable. It was chiefly in the full enjoyment of their property, that thoſe who aſſociated propoſed by confederation to be maintained; a circumſtance which immediately ſuggeſts a principle adapted to form a baſis of their union. A man to whom lands belong is deeply intereſted in protecting thoſe who occupy them. His tenants muſt be diſabled to pay their rent, and he cannot juſtly demand it, unleſs their poſſeſſion be undiſturbed. Their houſes, their cattle, their crops,

(*i*) Stat. Dav. II. c. 10. 31. 43.—St. Rob. II. c. 12.—Parl. 1503. c. 93.—Pitſcottie, p. 27. 228. 229.

crops, their labours, all muſt be ſafe; and his ſecurity is not a matter indifferent to them. Their farms are not only derived from his conſent, but held under engagements contracted to him: It is always convenient for them to participate of his favour: They cannot reaſonably expect aid, unleſs they be willing, on their own part, to lend it: And none of them, in his ſeparate capacity, can poſſeſs the ſtrength, or excite the awe, which may reſult from their combined efforts. The relation, therefore, created between the owner of an eſtate, and thoſe who inhabit it under him, binds them to each other; and among an untamed fierce people, an aſſociation, originating in neceſſity, came naturally to be formed between them for their mutual ſafety.

which werecommanded by the chief lord of their lands.

No military power can attain its utmoſt energy, or make the greateſt poſſible impreſſion on its enemy, unleſs its operations proceed on one regular conſiſtent plan, executed by the united exertions of all the individuals employed to perform each detached part. Its various members muſt compoſe only one body, which muſt be actuated by only one ſoul: Its conduct muſt be directed by one underſtanding: One will muſt determine its movements: Every limb muſt co-operate in making them: Otherwiſe, the advantages attainable from a complete junction of their whole

vigour will not be gained; and they may, from ignorance, either obſtruct the general deſign, or even, in different quarters, counteract each other's endeavours to forward it. The authority, therefore, by which troops, whether irregular, or regular, are commanded, admits not of diviſion; but, amidſt the gradation required among them, one univerſal ſuperior, whoſe orders ſhould be implicitly obeyed, muſt be acknowledged in every force which pretends to be deemed an army.

Among the different poſſeſſors of any grounds, the perſon who would commonly be allowed, on a competition, to have a preferable pretenſion to the ſupreme command, is the proprietor, to whom the lands belong. It is not to be expected that the reſt, holding themſelves nearly on a level with each other, ſhould ſubmit without reſiſtence or diſdain to an equal; but in their Lord they recogniſe one greatly elevated above them by fortune, to whom it will not offend their pride to act in a ſubordinate ſphere. Their thoughts, naturally conveyed to his caſtle, are concentrated there; and, even on a free election, the general voice would readily confer that diſtinction ſpontaneouſly upon him.

The vicinity of the dwellings of thoſe, who reſide in an eſtate, permits them to be aſſembled occaſionally on ſhort notice; and the purpoſe, for

for which they are ſuppoſed here to erect themſelves into a militia, requires not that they be conſtantly in arms; a ſervitude hardly compatible with their rural labours, or their other buſineſs: But they muſt always be ready, at the ſound of the ſlughorn (*j*), and at ſight of the fiery croſs (*k*), to march in array, even to their frontiers, in defence of their territories, of their adherents, or of their goods. The power, therefore, lodged in their commander, muſt neceſſarily laſt as long as the connection on which it is originally founded ſubſiſts between him and them, or as he remains proprietor of the grounds, and they continue to reſide in them.

Proprietary juriſdictions.

In that power, my Lord, your Lordſhip will diſcover an authority annexed, in the natural courſe of things, to lands (*l*); and a civil juriſdiction, as well as a military command, may be ſuppoſed, without any improbability, to have been derived from them to their owners, in ſome caſes. Property ſupplies the means of conferring favours, of ſhewing kindneſs, of creating attachments,

(*j*) The parole by which clans were diſtinguiſhed in Scotland, and, on alarms, were ſummoned by their chiefs to the field. Sir G. Mackenzie of Heraldry, ch. 33.—Pitſcottie, p. 213.—Hardyknute, 8. 9.

(*k*) The ſignal by which alarms were given, and clans were convoked on them.

(*l*) Reg. Maj. I. c. 17. § 2. 6. 7.

ments, of cultivating friendſhips, of inſpiring reſpect, of raiſing expectations, of purchaſing tools, of exciting apprehenſions, and of diſcomfiting or intimidating oppoſition; and dominion is commonly ſaid to follow it. Poverty and dependence are uſually accompanied with baſhfulneſs and with timidity: Grandeur and wealth are arrogant, and even imperious: And few people have reſolution to deſpiſe the frowns, or to reſiſt the dictates of ſuperiors, with whom they find themſelves diſabled to contend (*m*). In thoſe wilds of Scotland, whoſe preſent condition approaches neareſt to the ſavage rudeneſs of antiquity, tenants and cottagers, ignorant of the means of obtaining redreſs of their wrongs, or unable to defray the expence of actions at law, are frequently obliged, even in our days, to bear in a mournful ſilence great inſolence and much oppreſſion. Diſtreſſed as, in ancient times, huſbandmen were there by penury, they were neceſſitated to ſubmit, without murmuring, almoſt to any powers which perſonages, on whoſe caprice their tranquillity and their ſubſiſtence depended, were pleaſed to aſſume. Meſſages which ſhould be ſent them, requeſting payment of the rent ſtipulated at taking their farms, at firſt perhaps expreſſed in civil terms, would quickly be con-

(*m*) Heſiod. op. et di. I. 208.

converted, on a refuſal, or on a delay, into ſtern orders, which durſt not be diſobeyed. Hence the owners of lands might, and probably did, acquire, by acquieſcence and by cuſtom, a right to pronounce, either by themſelves or by deputies, decrees for performance of the obligations contracted by thoſe to whom their grounds were let: And ſimilar cauſes would gradually draw to them a power of judging in other matters. Perſons who had any demands on their neighbours, or who had been injured by them, would naturally communicate the buſineſs to their landlord, of whoſe mightineſs they knew that the ideas formed by their adverſaries, as well as by themſelves, were exceedingly lofty. This potentate, before taking his reſolution, would of courſe ſend for thoſe againſt whom a complaint had been directed, and would inquire into the affair. In caſes in which important facts could not be eaſily adjuſted, both parties would be confronted in his preſence; and his deciſion, pronounced on examining the matter, would import a command not to be diſputed by either. A landholder would thereby be exhibited to thoſe who occupied his eſtate, inveſted with a double character, of their judge in peace, as well as of their leader in war; each derived from the circumſtances in which affairs were then placed: Parties would be ſiſted before

before him; their claims would be diſcuſſed; judgements would be given by him; and his ſentences would be executed.

The haughty appellative, MASTER (*n*), is the correlative term ſtill uſed for LANDLORD, even in the judicial proceedings of Scotland; a ſtrong proof of the ſevere deſpotiſm exerciſed there, in ancient times, over thoſe uſeful citizens, the labourers of the ground. The awe with which his perſon was regarded by them, co-operating with affection and with habit, enſured from his tenants an indiſcriminate obedience almoſt to any mandates iſſued by him; and his dependents would not probably be either diſpoſed to examine his commands with accuracy, or able to diſtinguiſh caſes with nicety. Nevertheleſs, amidſt an authority, which, on its original bottom, among a rough people, in a tumultuous ſtate, might long be doubtful, a little diſcernment would ſoon ſuggeſt that he ought not, preſuming on their ſervility, to act entirely without caution; but that it would be prudent, if poſſible, to acquire for his judgements that weight which general approbation ſhould add to them. In his deliberations, therefore, before determining himſelf,

(*n*) Parl. 1493. c. 79.—Stair, B. 2. t. 9. § 16. 31. 39.—Macdouall, B. 2. t. 9. § 9.—Dict. of Deciſ. *Tack*, and the caſes cited in it.

ſelf, he would naturally hold counſel with a reſpectable number of his clan: His decrees, after having conſulted them, it would be indiſpenſably neceſſary to conform to their opinion: Sentences, founded in verdicts returned by the neighbours and the equals of thoſe againſt whom they had been given, would thence derive much ſolidity: And reſiſtence would never be made to their execution, unleſs, perhaps, either their extreme oppreſſiveneſs exciting a general alarm, or their revolting novelty ſhocking eſtabliſhed modes, ſhould impel inflamed ſpirits to ſudden mutiny.

An authority, which reſts on the preſumptuous confidence of him who aſſumes, and on the voluntary ſubmiſſion of thoſe who appeal to it, cannot well attain perfect ſtability, or even poſſeſs an indiſputable title to the appellation of juriſdiction, till it be either expreſsly recogniſed for legitimate by that ſovereign power, whoſe ſole act can directly beſtow a conſtitutional exiſtence upon it; or tacitly confirmed by age, a reverend quality, which, inſpiring an immediate perception of the great durableneſs of ancient objects, and exciting an impreſſion, as if, by length of time, they had acquired an immutability, diffuſes over them a venerableneſs that cauſes them in ſome ſort to ſeem ſacred. The juriſdiction incident to property would at firſt be indeterminate in extent,

tent, as well as irregular in exercise; but, being susceptible both of regularity and of precision, would be defined by degrees, and come at last to be settled with firmness. During many centuries after the Pictish empire had been subjugated by Kenneth Macalpin, even one supreme legislature was not universally acknowledged, or not firmly established, in Scotland: The inferior authorities, the judicative and the executive, more impotent than the legislative, could scarcely reach all over the kingdom: The country was rather subdivided into a vast number of small states, not easily accessible either to the general declarations, or to the particular interpositions, of national equity. The only force then kept on foot was the undisciplined militia, which has been described, but which was little acquainted with any officer superior to its Lord, or was not used to receive orders from another; and a few words uttered in a grave tone by a distant court, composed of ordinary men distinguished by fantastic robes, and encircled with official pageantry, to strike a confounding amazement on beholders, which, under regular polities, are able to terminate any controverted matter, were not always heard then with profound deference. A person resembling a magistrate was already found in every state; and it is generally agreeable, as well

well as convenient, especially for people whose residence is fixed at a distance from the capital seats of public justice, to sue for it, if obtainable, in a tribunal neither overloaded with business, nor far from their homes, from which a decision may be expected at little expence and in a short time. Administration was unable, without his permission, to execute its ordinances within his domains, otherwise than by engaging a potent neighbour to carry sword and desolation into his territories, and, in consequence, by increasing those disorders which wise politicians are ever studious to prevent. Government, therefore, sensible of its imbecillity, was obliged, by delegating in a formal manner some portion of its judicative power to the proprietors of lands, to bestow legality as well as exactness on the jurisdiction usurped by them.

SECT. III.

Origin of Tenures.—Their Antiquity in Scotland.

IT is seldom that ancient usages can be traced with certainty to those ultimate principles which first gave birth to them. Probable conjectures however may sometimes be formed concerning their remote causes. An establishment so singular as the feudal, whether it be supposed

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to have had its riſe on the banks of the Neſs or on the ſhores of the Baltic, among the mountains of Scandinavia or among the hills of Scotland, muſt have derived its origin from ſome natural views in which objects were contemplated in its native ſoil; and perhaps the obſervations, made in the foregoing pages on the authority and the juriſdiction annexed to chieftainſhip and to lands, may aſſiſt in conducting us to its ſource.

Authority annexed to property might be retained even after alienation,

All dominion, which, without increaſing the labour, adds to the importance of its poſſeſſor, ſeems in its nature to be ſomewhat elaſtic: That which is bounded, you will generally obſerve, inceſſantly maintaining a ſtruggle to expand itſelf: And an officer, conſtantly ſurrounded by retainers prompt to enforce ſubmiſſion to the determinations of his will, can hardly be expected, from moderation or from virtue, not to yield to the ſeductive charms of a brilliant acquiſition. The authority, therefore, incident to landed property, could not always be confined to tenants, the only perſons who have hitherto appeared to be the ſubjects of it. In proceſs of time, it would be extended to others, whoſe rank was higher, and whoſe right was perpetual. This effect would be produced by alienation. A man who diſſolves every connection which he ever had with a parcel of lands, except the ſorrow na-

tural to feel at parting with an object, towards which, having been long accuſtomed to call it his own, his eyes muſt frequently return with fondneſs, ceaſes to be intereſted either in themſelves or in their inhabitants: A total annihilation, therefore, of the influence here ſuppoſed to ariſe to the owner over the occupants of an eſtate, cannot be important to him after their relation is wholly looſed, eſpecially if his family moves to a diſtance. But to one who diſpoſes of only a part of his property, it can never be indifferent to rear in his neighbourhood a ſtrange power, independent of himſelf, which, becoming hoſtile, may ſoon attack his reſerved lands. Hence in old times, in which money was ſcarce, but barbarity abounded, and men looked with jealouſy on their neighbours, other transfers, than thoſe cauſed neceſſarily by deſcent from the dead to the living, could not be frequent. Nevertheleſs, partial alienations would ſometimes be made.

Before the vaſt objects of purſuit, which have been found to exiſt in the Indies, had been laid open by the diſcovery of thoſe regions, and, conſpiring with curioſity and with want, had not only given a rapid movement to the enterpriſing ſpirit of induſtry, but, by increaſing the knowledge, and by correcting the ideas, had effected a mighty revolution, which extenſive views and

an enlarged experience ſeldom fail to produce, in the narrow ſentiments of men, the younger ſons of landed gentlemen, without any outlets eſteemed ſuitable to their birth, were wont, from a falſe pride, to remain in loitering cantonments, quartered about the principal manſion of the family from which they were deſcended; and almoſt the only proviſion which their parents could make for them conſiſted of little farms. Hence every conſiderable eſtate was commonly diſtributed into many ſmall parcels, moſtly occupied by perſons ſprung of its ancient Lord, who, rendered dear by nature, and united by intereſt, enjoyed among themſelves that ſweet ſociety which near kinſmen and familiar friends find in a kindly intercourſe with each other. Such as got no more than temporary leaſes of the portions beſtowed on them, determined by the ſame motives which operated on other tenants, would be retained in full ſubjection by their dependence. But people born, and from their early infancy educated in a better way, can rarely ſubmit to behold their children degraded, more than to be themſelves reduced, to a level with that lowly order; which dwelt then amidſt meanneſs and poverty, as well as naſtineſs and toil. Men of fortune would wiſh to preſerve their ſons in a line more ſuitable to their extraction, than they could hold in the humble

humble ſtation of farmers of grounds belonging to others. Property would be conferred on them: And as thoſe who got it would be capacitated in their turn to acquire over their immediate dependents that proprietary influence which is its natural concomitant, their native ſuperior was obliged, on this account, to invent modes by which, even after diveſting himſelf, his priſtine authority might ſtill be retained both over themſelves and over their partiſans.

The affection, which is created by early familiarity and by long habit between thoſe who are related by blood, ſtrengthened as well as inculcated by education and by example, might bind together, for a conſiderable time, a whole kindred in perfect amity, but amidſt all its warmth is continually weakened by diſtance; and haughtineſs of temper, or love of independence, not to ſay interfering intereſts and inſolent treatment, producing great coldneſſes and ſometimes bitter enmities, inſtead of good-will, among near kinſmen, might at laſt excite them to mutiny and to rebellion. A man, therefore, who, by beſtowing lands on his children, was going to create a power which in time might become inimical to his family, would not ſuffer the continuance of their attachment to depend entirely on a bond ſo frangible and ſo evaneſcent as propinquity of blood, but would uſe

precautions more infallible to reſtrain both them and their deſcendants from growing formidable to his ſucceſſors. Intereſt, by which a faſt hold is obtained of ſelfiſh men, and whoſe operation is permanent, would be employed to enſure their fidelity, and care would be taken that their poſſeſſions ſhould never become altogether independent of that chief houſe which they were deſigned to ſupport. Either a power of recalling his donation at pleaſure would be ſtipulated by the donor, at making it, to himſelf and to his heirs; or a partial and conditional, inſtead of a total and abſolute alienation, would be made; and terms, on which the donee was to hold his gift, would be impoſed on him at accepting of the eſtate.

The precarioufneſs of the tenure, under which their property was held by thoſe whoſe right was redeemable, would of itſelf bind its owners to their good behaviour. A perſon, compellable to ſurrender valuable lands for a trifle, would be circumſpect in his conduct.

But natural affection is a ſtronger principle than an artificial partiality to a favourite created merely by primogeniture; and parents, at adjuſting their ſettlements, at the ſame time that they bent a ſtudious attention to maintaining a due ſubordination in the younger branches of their families, and to preſerving them cloſely united to the

the principal ſtock from which they had ſprung, would not leave them continually expoſed to be ſtripped of their patrimonies at every caprice of their elder brother. Rights, not defeaſible at his will, would frequently be conferred on them, and amidſt the independence thence to accrue to them, a great ſecurity might ſtill be obtained againſt their undutiful deportment, even in caſes in which a power of redemption was not reſerved to the donor.

by granting lands in perpetuity, under obligations ſimilar to thoſe implied in leaſe.

Tenants, it has been ſhown, were bound to follow their landlord to the field, as well as to ſubmit to his courts; and theſe duties came from cuſtom to be implied in leaſe. The ſecurity, therefore, wanted by fathers at ſettling appanages on their younger ſons, would be obtained with eaſe by conſtituting thoſe on whom they were beſtowed a ſpecies of leſſees, or by aſſimilating alienations to leaſes; a reſemblance, which it is neither a remote thought nor a difficult operation to give them. Bind the poſſeſſors to pay rent for their lands, and the relation of landlord and tenant, together with the obligations implied in that relation, would directly be created between them and the perſon to whom they were bound to pay it. Intended, however, not to be reduced to the level of farmers, but to retain the rank of proprietors, it was neceſſary both that their fami-

lies ſhould not be removable from their farms, and that their rent ſhould not be liable to augmentation: And, as the length of time which a leaſe is to laſt is variable at pleaſure, the inconveniencies apprehended from giving them lands would be avoided by declaring their right perpetual. Their ſucceſſors, as well as themſelves, would thereby remain incorporated parts of their native confederacy: Their hereditary connection, cemented by a direct tie, would be perpetuated with it: And on attaching them in that ſtrong manner, you might look with aſſurance from both, for all the aid and all the ſubmiſſion expected from the other aſſociates. Their enemies, their fears, their intereſts, their prejudices, would be the ſame with thoſe of the other renters of the eſtate: Having never been ſevered from the band, of which their anceſtors had been partiſans, and into which themſelves would paſs eaſily by ſucceſſion, they would continue united with thoſe who occupied that eſtate, with whom they would imagine themſelves both more naturally and more firmly connected by conſanguinity and by intercourſe, than with the poſſeſſors of any diſconnected lands; they would alſo obey, like other tenants, the commands of their lord both in war and in peace, or would perform under him, for the common ſafety, the ſervice accuſtomed to

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be done by his other followers, and would, no leſs than they, be ſubject to his juriſdiction.

The peculiar kindneſs entertained for them, and the ſuperior degree in which their poſterity, as well as themſelves, were meant to be preſerved, would both require and cauſe them to be diſtinguiſhed with much favour. Either military aid would be all the tribute demandable from them, or the rent, impoſed on them in money and in commodities, would be light: No duties, which had not been covenanted in expreſs terms, or which were not indiſputably implied in their bargains, could be exacted from them (*o*): They were excluſively entitled to the natural poſſeſſion of their grounds: And they were not liable to be deprived at the arbitrary will of their benefactors. Their poſſeſſions, therefore, would be both more beneficial and more independent than thoſe of common tenants; and, in conſequence, their rank would continue, as their birth had made it, and as it had orginally been deſigned to be kept, vaſtly higher. The whole powers implied in dominion would be exerciſed by them at pleaſure over their lands, and they would enjoy a dignity proportioned to the extent and the value of theſe. Hence they would not only ſeem to be proprietors; the property would ſoon come, by an eaſy

Hence tenures and vaſſalage.

(*o*) Reg. Maj. III. 22.—Qu. At. c. 3. § 4.

tranſition, to be formally veſted in them after that firm manner, in which a reaſonable attention to the ſecurity both of the landlord and of the tenant required it to be conſtituted, or in which lands are at preſent eſtabliſhed in inferior holders, under claims reſerved to the original Lords to whom, before theſe ſubaltern rights are granted, they belong abſolutely in demeſne.

My Lord, the learned diſquiſitions, to which lawyers have deſcended concerning the preciſe time at which the feudal law was introduced into Scotland, appear to be little leſs idle than thoſe minute reſearches made by antiquaries after the particular region from which this country was peopled. The Romans, in their progreſs towards the northern parts of Britain, found armies conſtantly in their front (*p*); a fact incontrovertibly atteſted by the oldeſt authors, in whoſe writings any authentic information is preſerved concerning ancient Caledonia (*q*): And a nation, againſt whoſe inroads, during the reigns of Titus, of Hadrian, of Antoninus, and of Severus, ſtrong forts, deep foſſees, high ramparts, and ſtupendous walls were obliged to be ſtretched by the victors from the German Ocean to the Iriſh Sea, muſt have been numerous. A doubt, therefore, cannot reaſonably be entertained, that men, as well as ſheep,

(*p*) Cæſar. (*q*) Tacitus.——Suetonius.

ſheep, goats, blackbirds, and gold-finches, exiſted north of the Tweed in the days of Alexander the Great: Our legends aſcend even higher than Fergus, the contemporary of that conqueror: And thoſe ſcanty remains, which form, during many centuries, that termed the HISTORY OF SCOTLAND, and which conſiſt of little more than a naked liſt of its Kings, bear a ſtrong reſemblance to the imperfect traditions, which, mingled with fables, and corrupted by them, might be tranſmitted, in its peculiar circumſtances, from age to age, concerning their memorable tranſactions. As its inhabitants appear to have been early congregated into ſociety, ſome ſort of laws as well as ſpecies of government, however disjointed, muſt have been eſtabliſhed among them. Nevertheleſs, amidſt the obſcurity in which the North continued long to be veiled, it would be raſh to affirm that fiefs either had been introduced among the Scots in the days of Julius Agricola, or made their appearance there ſooner than in other countries of Europe. At the ſame time, difficulties almoſt inſuperable are apparent in the hypotheſis commonly formed on their origin; and a thoughtful inquirer will not eaſily reconcile himſelf to believing, either that the feudal ſyſtem was an invention made deliberately by the northern nations, after they had over-run the Roman empire,

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for ſecuring an undiſturbed enjoyment of the rich provinces conquered by them in the fine climates of the South, or that it was voluntarily imported, on account either of its excellency or of its fitneſſes, by any people, all at once, by adoption from ſome other among whom they had met with it. A harmony of deſign, an aptitude of parts, a conſiſtency of principle, a length of view, are plainly diſcoverable in it, which could only be a work of time, and to which nothing adequate is found in the character of the Goths. Habit, giving both the mind and the body a natural and a conſtant tendency towards thoſe movements to which they are familiariſed, produces in them a ſtiffneſs, which renders our faculties and our limbs unpliable to others; and from the difficulty found in comprehending and in uſing things, greatly diſſimilar to thoſe with which we have been accuſtomed, it is long before our feelings can be fully reconciled to them. New modes are generally diſagreeable; and even in the eighteenth century an alteration of any inſtitution, rendered venerable by age, or familiar by cuſtom, enlightened as the world is at preſent, could ſcarcely be effected all at once in England or in France, two of the leaſt bigotted and moſt civilized nations of modern Europe. During the dark ages, improvement itſelf would have ſhocked

ſhocked the prejudices of the vulgar, that is, the bulk of mankind, whoſe only ſtandard, in moſt articles, is ancient uſage; and they ſhould have reſiſted it to blood. In countries into which the feudal ſyſtem was not brought by conquerors, it was probably an invention made gradually by the people themſelves, rather than a reformation accompliſhed at once by their legiſlatures: And in the foregoing deduction, your Lordſhip may perhaps have marked cauſes which might lead a barbarous nation by eaſy ſteps to invent it. Feudal grants either were originally little different from perpetual leaſes, or ſprang out of them.

A landlord, who, at diſpoſing in that manner of a part of his eſtate, was deſirous to retain the purchaſer and his ſucceſſors attached to his family, and who on this account ſtipulated from them performance of duties which might effectually bind them both to his heirs and to himſelf, had a claim to the rent and to the ſervices promiſed to him; and this right was perpetual. A conſtant as well as a ſtrong intereſt was thereby reſerved to him even after the alienation, which in ſubſtance amounted not to more than a leaſe, or differed little from it: And as a man, to be entitled, independently in himſelf, and inderivatively from any other, to draw rent for ground, muſt be owner; it was neceſſary, in order to beſtow a

ſolidity

ſolidity on his right, as well as to afford evidence of his title to demand payment, that the property ſhould remain with him. Hence he retained, after having made a perpetual grant charged with an yearly tribute payable for ever to his family, no leſs than after making a temporary leaſe, the character of Lord of the lands (*r*). He was not apparently diveſted of them: His title ſeemed not, even after alienating them, to have ſuffered any diminution: He appeared ſtill to be full proprietor: And the only perſon, in whoſe favour his intereſt was reſtricted, or who could tell him that it was really leſſened, was his proprietary tenant, the alienee. The perſon to whom the perpetual leaſe had been granted, having an indefeaſible as well as excluſive right to uſe the ground, being intitled at pleaſure to poſſeſs every power exerciſeable over it, and being bound to pay for his poſſeſſion no more than the conſideration expreſſed by him, was alſo owner. No other than his landlord could pretend to any intereſt in his farm; and even the alienor could neither controul him in the management of it, nor exact from him

(*r*) In ancient books he is termed ſimply Dominus, without any diſtinction. Reg. Maj. I. c. 10. § 2. c. 12. 24. 25. II. c. 40. 41. 42. III. c. 22.—Qu. At. c. 24. 25. 55. 92. 93. 94.——Form of Baron Courts, c. 45. 49.——St. Rob. III. c. 36.

him more than thoſe duties which had been promiſed at entering into the agreement. In every other reſpect, the unlimited property was veſted in him, the alone rightful poſſeſſor. But a leaſe is a title too ſlender to ſupport a perpetuity: His dominion, therefore, which his ſecurity required that he ſhould be enabled conſtantly to vouch, came to be conſtituted in a durable form, like to that in which the right of the leſſor was eſtabliſhed. Both parties were thereby rendered owners, or a property was veſted in each. The right of the donee was derived from the donor, and was intended never to become wholly independent of him; the former was ſubjected to perform ſervices, as well as bound to pay rent, to the latter; theſe duties were direct proofs, that his poſſeſſion was held under another: The intereſt veſted in him was thence eſtabliſhed on a mixed or compounded title, conſtituting him proprietor, but declaring his property to be held under his Lord, and binding him to performance of the render ſtipulated out of it. Behold a feudal right to lands. Accordingly, in England, the ſame word, which ſignifies a farmer who rents ground, is ſtill employed to denote a perſon who holds it of another. Their rights, probably differed at firſt chiefly in duration, and came only afterwards to be diſtinguiſhed by the form, or firmneſs and

ſlen-

ſlenderneſs, of their conſtitution. Tenant is an appellation given in ancient ſtatutes to the one as well as to the other in Scotland alſo (*f*); but the term FREEHOLDER is more common in our Engliſh ſtyle.

The amplitude of the intereſt acquired by one to whom lands were ſecured in perpetuity at a rent vaſtly diſproportioned to their value, rendering him leſs neceſſitous, would cauſe him alſo to be leſs tractable, than a common farmer. The ſteadineſs of the allegiance of a perſon placed in that condition, it would be evident, could not ſafely be truſted entirely either to the doubtful recogniſance, or to the ſilent operation, of obligations which were merely implied in his right, or which were ſuppoſed to be tacitly undertaken by him. Other means, whoſe action might ſupply the want of the reſtraint impoſed by poverty and by expectations, would be ſubſtituted in their place to repreſs any inclination, which natural feelings might occaſionally excite in his mind towards aſſerting a perfect independence. Every feudal tenant, at firſt acceptance of his grant, would be made to take the feudal engagements di-

(*f*) Reg. Maj. III. 22.—Qu. At. c. 55.—St. Rob. III. c. 36.—Parl. 1424. c. 9.—Parl. 1469. c. 44.—Parl. 1474. c. 71.—Parl. 1489. c. 33.—Parl. 1571. c. 5.—Parl. 1587. c. 31. p. 542.

distinctly on himself: A like declaration would be demanded from each subsequent owner to whom the fief successively devolved: And religion would be called, by intermingling its solemnity, to impress a sanctity on his professions: Forms, ingeniously contrived, by operating on his fancy, both to invigorate his sense, and to enliven his remembrance, of his vows, would lend their assistance towards ensuring performance of them: Limitations would be laid on hostile exercises of his property: And even forfeiture (*s*) would be denounced against violations of his faith. Hence humiliating ceremonies, expressive of the extreme sacredness of the engagements contracted by him, of the strict fidelity due from him to his Lord, and of the comparative inferiority of his own rank, were invented to strike his imagination and his heart, and being required to be frequently repeated, as well as performed with much pageantry, obliged him continually both to acknowledge and to remember his subjection and his duty. Every feudatary, at receiving investiture in his fief, made on his bended knees that submissive declaration which came to be termed HOMAGE, and in a reverend posture, with folded hands, swore FEALTY to him under whom his estate

(*s*) Reg. Maj. II. 63. IV. 11.—Qu. At. 19.—Form of Baron Courts, c. 43.

eſtate was held (*t*). Each proprietor, who afterwards acquired it either by deſcent or by purchaſe, was neceſſitated, before he could be admitted into poſſeſſion, to apply to the Lord, to whom, on every vacancy, the fief reverted; and at obtaining a renewal of his right, to pay a compoſition for the recovery of it, as well as to take ſpecifically on himſelf the obligations implied in his tenure (*u*).

A man who held his property under another, having been originally inferior to his Lord, would not ſoon become inſenſible to every impreſſion of the low condition in which himſelf or his family had been found at acquiring it. Amidſt any addition derived to his importance from the acquiſition, the littleneſs, in which he ſhould ſtill appear even in his own apprehenſion to remain, returning continually to his thought, or brought to remembrance by tradition, would conſiderably check the loftineſs of the ſentiments formed by him on his elevation; and the duties, obliged to be performed by him, were direct as well as perpetual acknowledgments of inferiority (*x*). The inſolent name, which marked the maſterful authority enjoyed over removeable tenants, was not however

(*t*) Reg. Maj. II. 62.—Libri Feud. II. 5. 6. 7.—Balfour's Practics, p. 38. (*u*) Reg. Maj. II. 60.
(*x*) Reg. Maj. I. c. 25. § 5. 9. 10.

however assumed by a Lord to distinguish him above his feudatary: Another appellation, more gentle in itself, but expressive still of superiority, denoted their relation. A proprietary tenant, at doing homage to his SUPERIOR, professed himself his MAN (*y*), or enlisted among his followers; and at swearing fealty bound himself by oath to be faithful in his service. Hence he pledged himself to the confederacy to which he associated, or became a surety for their safety to all the members of it; and acquired, perhaps on that account, the denomination of vassal (*z*).

It was probably in this way that fiefs came to be invented. Leases were transformed into them, and the obligations implied in the latter were transferred to the former. The steps, which might gradually lead to the transition, are obvious; and the dangers, dreaded from partial alienations, would be escaped by the invention. Neither would the territories of the Lord, who had alienated his lands, be lessened in extent, nor would his forces be diminished in number: But his influence, or military and judicative power,

(*y*) Homo. Hence homage. St. Mal. c. 1. § 1.—Reg. Maj. II. c. 42. § 1. c. 62.—Form of Baron Courts, c. 45.—Balfour's Practics, p. 38.—Rymer, iv. 537.

(*z*) In Italian, VASSALLO; in French, VASSAL: Both diminutives from the Latin VAS.

would rather be fortified by engagements solemnly made to support it; subordination also would be introduced among his troops; and inferior officers, attached to his family by consanguinity, would be provided to assist him in conducting his followers to battle.

Their antiquity in Scotland.

Into Italy, and the other countries of Europe which border on the Mediterranean and the Adriatic, the feudal system was certainly brought by those savages, who, issuing in herds from the North, overthrew the Empire of Rome, and, expelling its vanquished citizens from the lands which had belonged to them, continued still, in their new settlements, to be governed by their own customs; the only usages with which they were acquainted, or to which they would submit. But its introduction is not ascribed in Scotland, either by history or even by tradition, to conquest; and reason hardly allows us to suppose, that, in every instance, it was constantly derived progressively by communication from one people to another. Among us, its origin must be sought in causes different both from force and from adoption; and in their primitive condition your Lordship will discover seeds which might naturally give birth to it among the early inhabitants of this country. No doubt, amidst the great variety to which human conceptions, and of course human affairs,

affairs, are incident, a diverſity almoſt imperceptible in thoſe minute circumſtances which ſtrike the firſt impulſe on thought, giving them a particular direction, may produce inſtitutions widely different in nations found in ſtates apparently ſimilar; and a man, acquainted with the ſlender evidence on which his conjectures muſt here be built, will not aſſert dogmatically, that fiefs did not originally ſpring without tranſplantation in climates extremely diſtant, perhaps entirely diſconnected, from each other. They muſt unqueſtionably have been eſtabliſhed in ſome region before making their appearance in any other: But light is wanting to guide us with certainty to that region; and we find vaſſalage already rooted in ſeveral ſoils, among others in Scotland, as early as any records concerning them aſcend. The feudal plan, it has been ſhown, in all probability derived its firſt lineaments from the feebleneſs of government and the barbariſm of its ſubjects: And the ancient Scots were aſſuredly in a ſtate ſufficiently rude for neceſſity to generate it among them by degrees. Few people can well be imagined either leſs diſpoſed, or leſs capable, than they, to reliſh or to adopt from others a great and ſhocking innovation. Not only is the term FIEF found, but the feudal principles can be diſtinctly traced, in the oldeſt documents extant

concerning the Scotch conſtitution. Thoſe venerable ſtatutes, which, by a perpetual tradition, the chief proof afforded us of either the age, the author, or the authenticity of any ancient book, have generally been aſcribed to Malcom II. who reigned in Scotland before the acceſſion of William the Conqueror of England, are full of them: And the ſyſtem itſelf is profeſſedly treated in an inſtitute of the Scotch laws, which bears in its preface to have been compiled by order of David I. (*a*). Malcom's laws prove, that the king had his men (*b*) before making the donation recorded in them. Among the ordinances of Kenneth III. one is found concerning the wardſhip of heirs, and their diſability to demand inveſtiture in their eſtates before attaining the age of twenty-one (*c*). A charter, by which Alexander II. reinveſts Allan of Lani, and Margaret of Lani, in the lands of Lani, to be held by themſelves and by their heirs, under an obligation of performing the ſervice wont to be rendered for them to the crown, creates a high probability, that tenures had been introduced among us early in the tenth century. In the archives of Buchanan of

(*a*) David's reign began in 1124.—Statutes of William the Lion.—Ancient charters, &c. (*b*) Homines, Vaſſals. (*c*) Balfour's Practics, p. 682.—Boet. l. 11. p. 240—Buchanan, l. 6. c. 39.

of Lani, is ſtill preſerved a little ſilver ſword, about two inches and a half in length, the ſymbol, which Alexander there aſſerts had been given, at the original granting of thoſe lands to their anceſtor Gilleſpic Moir, by his predeceſſor, that profligate debauchee, Culen, whoſe enormities, marked in hiſtory, are hardly credible, but whoſe exiſtence is fully authenticated by that curious relick. Trials by jury, a feudal inſtitution, are mentioned in the laws of Kenneth II. (*d*).

In Scotland, no leſs than in other countries, the improvements made on tenures muſt have been gradual. In all likelihood, before arriving at that extreme rigour which is ſometimes termed their entire purity, they went through the whole progreſs naturally required in advancing them to perfection; and thoſe whoſe eſtates were extenſive, in appanages beſtowed on their children, or in ſales made to others, had vaſſals, who held of them in terms ſtrictly feudal, long before all the lands in the kingdom had come to be holden of the crown. It is not eaſy, on any other ſuppoſition, to account either for the reſtraint or for the forfeiture impoſed on the alienation of military fiefs without conſent of their ſuperior. His ſubjects being ſuppoſed to be all equally well

(*d*) Balfour's Practics, p. 680.—Craig, L. 1. d. 8. § 2. 3. 4.—Fordun, l. 4. c. 9.

affected to the King, it muſt have been a matter perfectly indifferent to the Sovereign, whether one perſon or another perſon held an eſtate under any of the royal vaſſals; and rich Lords, without very cogent motives, would not voluntarily ſubject either their property or their power to his caprice: But a private man, to whom grounds belong, who lives in them, and whoſe ſafety, as well as importance, depends greatly on his neighbours, is deeply intereſted in the character and the affection of thoſe who are introduced on his lands: And after a full conſideration, the ſtory recorded in the laws of Malcom will not perhaps appear entirely deſtitute of probability. That Prince having delivered his territories from the deſolating rapacity of Grim, and from the dreaded incurſions of the Danes, had acquired, in conſequence of the ſplendid ſucceſs gained by him in war, a mighty authority in his country: Having again conſolidated all Scotland under one head, he would naturally be deſirous, in order to ſtrengthen the attachment borne to him by his ſubjects, and to unite his people more firmly among themſelves, to introduce an uniformity into the conſtitution: And it is not at all impoſſible, that amidſt the exceſſive fondneſs commonly diſcovered, eſpecially in the caſe of reſtorations, to new Kings during the firſt moments

after

after their acceſſion, he might prevail with his nobles, after the feudal mode had already diffuſed itſelf pretty extenſively over his dominions (*e*), to make ſome alteration in their forms; that thoſe, who hitherto had not held their property under any ſuperior, ſubmitted to hold it in future of the crown; that on their own death, they agreed to put both their fiefs, and their heirs, during their nonage, under the guardianſhip of their Sovereign; that, for enabling him to ſupport his houſehold in a ſtyle ſuitable to the ideas vulgarly entertained about the dignity of royalty, they ſubjected their ſucceſſors to a fine termed RELIEF, payable at obtaining admittance into their inheritance; that he diſtributed ſome of the demeſnes, belonging to himſelf, in rewards among his men; that, in order to carry their plan into full execution, and to give it perfect ſtability, they made a formal ſurrender of their lands into the hands of the King, in favour of themſelves, on condition that each eſtate ſhould be directly reſtored to its owner; and that the agreement was honourably fulfilled by new grants, beſtowed, conformably to the views of both parties, indiſcriminately on every one of them: All which ſuch as read with accuracy will diſcover in that famous ſtatute.

(*e*) Fordun, l. 4. c. 48.

SECT. IV.

Nobility conferred on Lands.

Feudal dignities.

MY Lord, under a feeble government, the progress from great barbarity, through defensive leagues and military associations, to feudal tenures, is very natural; and that native authority, which your Lordship has now beheld arising out of landed property, however different from those honours about which we are inquiring, led directly to the production of them. In Scotland, people of fortune, neither invited into town by the elegance of its entertainments, nor allured to Court by the prospect of interest, were wont mostly to reside at a distance from both, retired, on their own demesnes (*f*). There the only equals, by whom their habitations were ever approached, were those rare individuals placed in like fortunate circumstances with themselves; and their lands formed the objects towards which, in the comparisons made by envy and by pride between those who pretended to an equality, their imaginations were principally directed. It was their

(*f*) Buchanan, l. 10. c. 41.

their eſtate, which both exalted them above their inferiors, and raiſed them to a level with their equals. Each proprietor, therefore, would endeavour to procure to his property ſomething, which, both in his own conception, and in the opinion of others, ſhould elevate it above that of his neighbours. A better huſbandry and a finer culture, thoſe vulgar means that lead to ſuch diſtinctions only as, depending on plain induſtry, are placed equally within the reach of every man, little prized in a country which was inhabited by a people exceedingly averſe to labour, would be abandoned to thoſe ſober, but deſpiſed, ſpirits, whom a juſt taſte of life, an accurate eſtimation of things, or a happy temperature of mind, prevented from being ſeduced by the falſe luſtre of deceitful appearances. Roads, more artificial and leſs obvious, by which near approaches are made to thoſe who had once been ſuperiors, by which others who had originally been equals are left at a diſtance, by which vanity is more gratified on ſucceſs, and which few even aſpire to attempt, deriving a dazzling brilliancy from the heights and the difficulties neceſſary to be ſurmounted before their extremity can be reached, would be more admired and more choſen on that account.

Among the Scots, as a man's importance, and even

even his safety or his quiet, depended greatly on the multitude and the affection of his followers, ingenious artifices would be contrived to strengthen their attachment and to augment their number. Not only an entire solidity, but large additions, would be endeavoured to be acquired to that ordinary authority which is naturally consequent on proprietary influence; and a higher dominion, by which his subjects might be retained in their duty, would be sought over them. Hence various jurisdictions, rising in gradation above one another, would be invented, and every proprietor would obtain all the amplitude which he could to his own power.

Those jurisdictions, differing in the rights implied in each rank of them, it was convenient, if not necessary, both to distinguish by proper names, according to their several prerogatives, and to annex to the lands in whose owners they were meant to be vested; purposes that could not be accomplished in either an easier or a surer way than by conferring the denomination, invented for each species, on the estate which was propoposed to carry to its owner a correspondent jurisdiction, or, in other words, by erecting the lands into it. The lands and the jurisdictions, being thereby incorporated, would constantly accompany each other: A clear idea of a determinate au-

authority would directly be excited in every perſon who heard of the appellation which had been affixed to any fief: And a hint was thence ſuggeſted, that eſtates were ſuſceptible of being exalted by diſtinctions above one another, or that titles might be conferred on them. The ampler the juriſdiction which was beſtowed on any lands, the conſequence of the perſon to whom they belonged would be the greater among thoſe ſubject to it; and the higher the denomination to which they were raiſed, their owner, whoſe dignity reciprocated to his eſtate, would be proportionably elevated in rank. But there is a height above which proprietary juriſdiction ought not to aſcend; and as, at this lofty degree, it might degenerate into a tyranny, dangerous to the ſtate, as well as inſupportable by thoſe expoſed to its ſeverity, a difficulty would ſoon be found in attaining to it, and at laſt it would rarely be granted. An eminence, however, it would ſtill be perceived, might be gained from a diſtinction not wholly diſſimilar, which ſhould be more harmleſs, and which it is not a remote tranſition to make.

Territorial honours.

An eſtate larger than another being in itſelf a grander, as well as in moſt caſes a more valuable, object, fills imagination more, and beſtowing on its owner greater riches and of courſe, ampler ability both of real beneficence and of external ſplen-

ſplendor, ſeems naturally entitled to be raiſed to higher dignity, than a ſmaller, which, in itſelf implying an inferiority, and commanding leſs attention to him, it would be thought, ought not to retain a denomination equally high. The dignity of lands would be diſtinguiſhed from the power annexed to them: The former would be increaſed without extending or even regarding the latter: Different degrees of it would be marked by names peculiar to each; and a ſuperior title would be given to the grander object, or to any eſtate propoſed to be placed in a ſuperior order. Its Lord would thereby be elevated above all whoſe fiefs were not promoted to a like honour. Each ſtep which property was advanced would flatter the vanity of its proprietor, who found his family, by a ſimple contrivance, exalted above others that had formerly been equal, and which, perhaps in other reſpects, continued ſtill on a level with it. This mode would often be taken in caſes in which eſtates, co-ordinate in juriſdiction, differed in magnitude: And in thoſe in which both had already arrived at the higheſt point beyond which ſound policy or conſtant uſage ſuffered not proprietary authority to be ſtretched, another method could ſcarcely be employed to gratify their rivalſhip.

My Lord, profound theories, which pretend to trace

trace *à priori* matters of fact, or of real existence in human affairs, from the mechanical effects which objects are supposed to be naturally fitted to produce on the imagination, founded in such nice views of things as can only be formed by abstruse metaphysicians after deep study, may be grateful to a few refined spirits, who can enter with ease into abstract speculations, and who can relish their sublimity; but are also extremely apt to lead into egregious errors, nay, into despicable puerilities, unless good sense and great accuracy incessantly restrain them in their progress; and David Hume is perhaps the only Scotchman who has ever attempted that philosophical method with any success (*g*): Yet, even his ingenious disquisitions, rendered, by their subtility, incomprehensible and painful to coarse and vulgar understandings, have been triumphantly made a vain sport to the presumptuous and the ignorant. Conclusions built on those common principles, by which mankind are experienced to be actually influenced in their conduct, and whose solidity is continually proved by appeals made to real life, bid much fairer to be just. A man, therefore, who would arrive at truth in any complex question of ancient jurisprudence, instead of directing his attention to any visionary state assigned to his spe-

(*g*) Treatise of Human Nature, V. 3. b. 3. p. 2. s. 3. 10.

ſpecies by his own fancy, ought, amidſt the extenſive views taken by him, to keep his eye ſteadily fixed on the particular nation about whoſe antiquities he is inquiring, and, at every inſtant, to reflect with ſobriety on the way in which, according to the uſual practice of common ſenſe, a people placed in their circumſtances would think and act, in conſequence of the immediate neceſſities under which they laboured, and of the paſſions directly inſpired by the objects with which they were ſurrounded. In this way, concluſions, conſonant to reaſon, can alone be diſcovered. Poſſibly the account which I have given, different as it is from that commonly delivered concerning the origin of fiefs and of honours in Scotland, may nevertheleſs be found, on an acute examination, to be agreeable to thoſe natural ſentiments, which, it muſt be owned, poſſeſs a mighty, however imperceptible, influence in leading men to all their eſtabliſhments: But a ſyſtem, contradictory to fact, muſt alſo be deſtitute of a foundation in truth, and, of conſequence, can never be valuable. Hence, in making my deduction, I have not ventured either to lanch into, or to proceed on, any general proſpects of thoſe which, in the faſhionable language of late years, have ſometimes been termed the early periods of ſociety, but, during my progreſs, have kept conſtantly in ſight the peculiar condi-

tion in which the ancient Scots were really found; and my theory is, perhaps, in that way, the only way in which I could expect it to be, confirmable by facts, and provable from record.

Finnan, one of those doubtful personages whose obscure names are preserved in the traditionary list of the Scotch Kings, is reported to have reigned over us a hundred years before the death of Augustus: And the tribes and their captains are mentioned in the laws ascribed to him (*b*).

The oldest fiefs in Scotland, and, indeed, all over Europe, it is universally agreed, were military fees. Martial tenures were long termed, as well as alone esteemed, proper or right tenures: All others were deemed improper and degenerate. Lands, not proved to be holden on different terms, were presumed to be held in that manner. Military service constituted the ordinary duty which vassals were bound to render to their lords: SERVICES USED AND WONT, is the technical expression employed in formal deeds to signify those performed in war (*i*): And the command in arms, held by proprietors of estates over

(*b*) Balfour's Practics, p. 678.—Boet. l. 1. p. 4. 6. 7.

(*i*) Sir George Mackenzie's Institutions, B. 2. t. 4—Stair, B. 2. t. 3. § 5. 6. 31.—Macdouall, B. 2. t. 3. § 3. 9. 51.—Erskine B. 2. t. 4. § 2.—Craig, L. 1. d. 10. § 27: L. 2. d. 17. § 33.—See Reg. Maj. I. c. 25. § 5. 9. 10.

over thoſe belonging to their clans, is intimated in the common appellations, which were long borne, and perhaps are ſtill retained, by ſome families. Among the commiſſioners nominated for levying a ſupply granted to the crown in 1690, your Lordſhip will find the Captain of Carrick, the Captain of Craigneiſh, and the Captain of Dunoon; deſcriptions given of them even in an act of parliament (*k*). Captain of Clanranald is the addition employed for diſtinguiſhing Ranald Macdonald in a Britiſh ſtatute attainting him of high treaſon (*l*).

On the death of a vaſſal, or of any perſon belonging to a clan, his Lord or chief was entitled, by an ancient cuſtom, to obtain from the heir an acknowledgement for the protection to be afforded his family; the beſt horſe, the beſt ox, the beſt cow, in ſhort, the beſt beaſt, which pertained to the deceaſed. That conſideration, probably from the rapacity which thoſe who laid claim to it ſometimes employed to ſeize their boon, acquired the name of *Caupe* (*m*); and giving occaſion to much extortion and even oppreſſion, was only proſcribed by degrees, firſt in the reign of James IV. by particular ſtatutes, out of Galloway, then out of

(*k*) Parl. 1690. c. 6.—Compare Parl. 1689. c. 32.—Parl. 1704. c. 4.—Parl. 1587. c. 94. 95.

(*l*) 1mo George I. c. 12.

(*m*) From *capio*.

of Carrick, and at laſt in that of James VI. by a general law out of all Scotland (*n*).

A juriſdiction, as well as an influence, was, and ſtill is, annexed to property: The former, as well as the latter, being veſted in the owner, extended to all who lived in his grounds: And proprietary authority reaches to lands reſerved in ſuperiority only, no leſs than to thoſe poſſeſſed in full property. It was raiſed, alſo, to different heights, as well as diſtinguiſhed by different names; Baronies, Regalities, Juſticiaries; into which lands, intended to convey the power reſpectively imported in each denomination, were elevated (*o*).

In ancient times, juriſdiction was adminiſtered by judges, who were aſſiſted and controlled by inqueſts, conſiſting, in inferior patrimonial courts, of boors dwelling in the eſtate, and, in ſuperior or general courts, of jurors taken from the vicinage (*p*).

H The

(*n*) Reg. Maj. II. c. 36. § 2.—Parl. 1489. c. 35. 36.—Parl. 1617. c. 21.

(*o*) Stair, B. 2. t. 3. § 62. 63. — Macdouall, B. 2. t. 3. § 83. 89. 90. 95. 96. 97. 100. B. 4. t. 14. § 1. — Erſkine, B. 1. t. 2. § 11. t. 4. § 25. 26. 27.—Reg. Maj. II. c. 63. § 7. 8. 9. 10. 11.

(*p*) Craig, L. 1. d. 10. § 3. L. 2. d. 2. § 24. L. 2. d. 17. § 28. L. 3. d. 7. § 2. 7. 11. &c.—Stair, B. 2. t. 3 § 3.—Macdouall, B. 4. t. 33. § 2. — Hence thoſe termed Boorlaw courts. Reg. Maj. IV. c. 39. § 8.

The portions, too, beſtowed on younger children, often conſiſted of ſmall pieces of ground termed WADSETS, to which rights, redeemable at pleaſure, were conferred on them. Like grants were made to favourites.

Not juriſdictions only; honours alſo, were incorporated with lands: And thoſe, annexed to fiefs, often differed widely in degree. In Scotland, my Lord, it was common, for the convenience of the landholders, to unite into one tenement eſtates, which conſiſted of things legally ſuſceptible of union, that either were different in kind, ſuch as lands, tithes, patronages, fiſheries, mills, and the like, or were not contiguous. Names, eſteemed honourable, were conferred on others more favoured than the former. A dignity, termed a Thanedom, ſeems to have been extremely ancient in the North; and Cawdor, of which Macbeth became Thane, ſtill retains in the charters of its proprietor the generic appellation poſſeſſed by it in the remote reign of Duncan (*q*). But that which came to be moſt commonly granted, is denominated a Barony; a preeminence, which, beſides the advantages implied in union, brought to its owner a high criminal as well as civil juriſdiction. Lordſhips, Earldoms, Marquiſates, Dukedoms, are ſuperior denominations,

(*q*) Macbeth, act 1. ſc. 4.—Buchanan, l. 6. c. 52.

tions, which rise in gradation above one another; and lands, intended to be peculiarly exalted, were raised to them (*r*).

SECT. V.

In Scotland Territorial Honours were not Proprietary Jurisdictions.

THE erecting of lands into regalities, or even into justiciaries, the highest territorial jurisdictions common in the ancient practice of Scotland, united not the persons invested with them to any peculiar order, and did not imply nobility: They might be bestowed on ignoble, such as naked freeholds, no less than on noble fiefs; and had not a particular title annexed even by courtesy to each of them; but denoted magistracy, and conferred authority only (*s*). The erections, alone productive of that effect, were Earldoms, Marquisates, Dukedoms, and Lordships.

(*r*) Craig, l. 2. d. 7. § 17. 18.—Stair, B. 2. t. 3. § 44. 45. 62.—Macdouall, B. 2. t. 3. § 88. 89. 95.—Erskine, B. 2. t. 3. § 45. 46. See also B. 1. t. 4. § 25. 26. &c. B. 2. t. 6. § 18. &c.

(*s*) Macdouall, B. 2. t. 3. § 100. B. 4. t. 15. § 7.

Lands were not erected into Lordſhips, Earldoms, Marquiſates, and Dukedoms, either to veſt in theirowners any extraordinary juriſdiction,

The intention of advancing lands to honours ſuperior to Baronies, or of erecting them into Lordſhips, Earldoms, Marquiſates, and Dukedoms, was not to beſtow on their owners any peculiar, or high and extraordinary, juriſdiction. It is indeed aſſerted by ſome writers (*t*), that Earls, if not other Peers, at their original inſtitution, were officers ſet over provinces, termed Counties or Shires, which were ſubjected to their authority; and that ſheriffs were deputies, who came, in proceſs of time, to be employed to perform the duties of the office in place of the principals to whom they were ſubſtituted; an obſervation applicable, perhaps, to England: But we ſeem not to have any ſolid ground, either from ſtatute, from hiſtory, or from record, to ſuppoſe that it ever applied to Scotland. Earldoms are objects entirely different from counties: The terms do not reciprocate.

Many counties which ſtill ſubſiſt; the ſhires of Air, of Bamff, of Clackmannan, of Edinburgh, of Inverneſs, of Kinroſs, of Kirkcudbright, of Nairn, of Renfrew; appear never to have had Earls who were connected with them, or who took titles from them. I might add Aberdeen, Bute, Cromarty, Dumfries, Elgin, Forfar, Haddington,

(*t*) Eſſays concerning Britiſh Antiquities; eſſay Honour, Dignity.

dington, Kincardine, Lanark, Linlithgow, Lothian, Perth, Roxburgh, Selkirk, Stirling, and Tweeddale, from which ſtyles were indeed taken, but only in times extremely modern, and long after theſe diſtricts had been eſtabliſhed into diſtinct ſhires, each ſubject to its proper ſheriff: The honours, too, conferred on the noblemen who bore them, were merely perſonal; and their titles ſeem not all to have been derived from counties, but were ſometimes brought from boroughs or other places lying in them.

The Earldoms of Angus, of Argyle, of Caithneſs, of Fife, of Lennox, of Murray, of Orkney, of Roſs, of Sutherland, of Wigton, included not the whole lands contained in the counties which carry their names. I believe that no earldoms, or hardly any, did. Large eſtates, locally ſituated in theſe ſhires, were not even held in vaſſalage of the noblemen who got titles from them.

Many Earldoms formed no more than ſmall parts of counties; and were compoſed of various parcels of lands, diſperſed in different ſhires, and at great diſtances from each other. Thoſe of Caithneſs, of Sutherland, and of Roſs, continued long to be parts of the ſhire, and ſubject to the ſheriff, of Inverneſs (*u*). The former ſeems

 not

(*u*) Parl. 1503. c. 93. 95.—See parl. 1503. c. 108. 128.—Parl. 1509. c. 137.—Parl. 1587. c. 46. 82.—Reg. Maj. I. c. 16. 20.

not to have been diſſevered from Inverneſsſhire till after the year 1617: A magiſtrate indeed, to ſit at Dornock or at Wick, had been authorized, in the days of James IV. to exerciſe that juriſdiction over the dioceſe of its Biſhop (*x*). It was only in 1633, or at ſooneſt in 1601, that Sutherland was erected into a county (*y*): And Roſs, after a ſheriff had been ordered by parliament, in 1503, to be appointed over that diſtrict, was not finally eſtabliſhed into a ſhire by itſelf before the year 1661, or rather 1649 (*z*). The Earldom of Marre (*a*), and the Earldom of Buchan

(*x*) Charter of the Earldom of Caithneſs, 7th December 1476, printed in the caſe of the Earl of Caithneſs.—Precept dated in 1524, and charter dated in 1589, printed among the papers exhibited to the Court of Seſſion in 1772, in a cauſe, Henderſon of Stemſter v. Sinclair of Ulbſter and Sinclair of Southdun.—Parl. 1617. c. 16.—Parl. 1641. c. 18. (and c. 264. not printed).—Parl. 1644. c. 9. 25.—Parl. 1503. c. 95.

(*y*) 32 act (not printed) of Parl. 1633.—Parl. 1641. c. 19. —Charters of the Earldom of Sutherland, dated in 1455, in 1527, in 1546, and in 1580, publiſhed in an Appendix to the Caſe of the Counteſs of Sutherland.—Charter dated 29th April 1601, cited in Appendix to the Caſe of Sir Robert Gordon.

(*z*) Parl. 1503. c. 95. Parl. 1617. c. 16. Parl. 15th March 1649 (not printed). Parl. 1661. c. 14.—Act (not printed) of Parl. 1661.

(*a*) Charter of the Earldom of Marre, dated in 1561, printed in Appendix XXIII. to Brief of Sir Robert Gordon—Reg. Maj. I. c. 20.

chan (*b*), very ancient dignities, ſtill lie in Aberdeenſhire, and ſeem always to have lain in it. Athole and Menteith are both ſituated in the county of Perth. Carrick lies in Ayrſhire.

It is not pretended that, in Scotland, Lords, Viſcounts, Marquiſſes, or Dukes, ever were magiſtrates appointed over territories aſſigned to them. This idea is confined to Earls: Yet the juriſdiction belonging to the firſt four orders is in every reſpect co-ordinate to that enjoyed by the laſt; a proof, that among us the notion has probably originated in a grammatical conceit, derived from the etymological analogy remarked between the Latin words (*c*), commonly employed in tranſlation for Earldom and for ſhire, which ſeem to imply that the latter had been ſubſtituted in place of the former.

Sheriffs appear not to have ever been named by Earls; but were nominated, either mediately or immediately, by the King. Even thoſe who held the office by inheritance in property, derived their right originally from the crown; and the deputies, appointed by the nobility to exerciſe their juriſdiction over their fiefs, were not diſtinguiſhed by any appellation differerent from

(*b*) Charters of the Earldom of Buchan, dated in 1477, printed in Appen. Brief, 20.

(*c*) Comitatus and Vicecomitatus.

Bailli (*d*), that commonly given to their ſubſtitutes by other proprietors of lands.

The term VICECOMITATUS, which in both nations is uſed for ſhire, and in conſequence the exiſtence of thoſe diſtricts termed Counties, or the diviſion of the kingdom into them, appear to be as old as any authentic records or genuine hiſtory concerning the conſtitution of Scotland, or as COMITATUS themſelves (*e*): And it is both vain to puſh inquiries, and preſumptuous to carry dogmatiſm, into regions or into periods, involved in darkneſs, in which certainty and truth cannot be reached. In the moſt ancient monuments, in which the orders of the ſtate are enumerated, ſheriffs are numbered among the ordinary officers of juſtice; the Juſticiary, the Coroner, the Provoſts, and the Baillis of boroughs (*f*): A light, in which thoſe properly underſtood by the Latin Comites ſeem not to be viewed. Earls are there accounted no more than

(*d*) Parl. 1581. c. 28. (*e*) Balfour's Practics, p. 677. 679.—Stat. Reuth.—Stat. Kenneth II.—Stat. Malc. II. c. 7. 8. &c.—Reg. Maj. I. c. 9. § 6. IV. c. 25. 27. 28.—Qu. At. c. 13. c. 52. § 1. c. 55. § 3. c. 71.—Leg. Burg. c. 55. 134.—Stat. Wil. c. 36.—Stat. Alex. II. c. 2. 8.

(*f*) Stat. Malc. II. c. 7. 8. 15. 16.—Qu. At. c. 42. 49. &c. 101.—Stat. Wil. c. 2.

than proprietors of lands, and are claſſed with Barons (*g*).

Neither an Earl, nor any other owner of fiefs ennobled in this country, did thereby acquire or ever poſſeſs power over any lands, except thoſe which belonged to himſelf either in property or in ſuperiority; and it is certain, that they enjoyed not, in conſequence of any honour reckoned ſuperior, an ampler juriſdiction than that implied in a barony: A circumſtance which ſeems perfectly deciſive. A Dukedom conferred not a higher juriſdiction than a Marquiſate, an Earldom, or a Lordſhip: A Marquiſate did not imply a higher juriſdiction than an Earldom or a Lordſhip: A Lordſhip was not inferior in this reſpect to an Earldom: And the power implied indiſcriminately in every one of them was neither more nor leſs extenſive than that ordinary authority implied in a ſimple barony (*h*). In books

(*g*) Stat. Malc. II. c. 10 — Reg. Maj. I. c. 4. § 1.

(*h*) 'The erection of lands into a Dukedom, Marquiſate, 'or Earldom, did not extend the juriſdiction and privileges 'beyond thoſe of a barony.' Macdouall, B. 2. t. 3. § 95.

'No other feudal privileges, higher than thoſe of Barony, 'are included in the erection of lands into an Earldom or a 'Lordſhip, &c.; for theſe laſt are only titles of greater dig-'nity conferred upon a Barony; but all have preciſely the 'ſame feudal effects.'——'The erection of lands into an Earldom

books which explain the jurisdiction annexed to property, the term *Baron* is generally used for brevity, in an extensive signification, to comprehend Lords, Earls, and all whose estates are erected into superior dignities (*i*). Higher as well as different jurisdictions, rights of justiciary, rights of regality, rights of bailliwick, are well known; but, in cases in which they were intended to be bestowed, the particular species meant to be conferred was expressly granted, or the lands were incorporated into the denomination correspondent to it.

An Earl possessed not even the power of shrievalty within his Earldom. In ancient times, an appeal lay from the judgement of the proprietor to the

'Earldom or Lordship imports no higher jurisdiction than 'Barony;' Erskine, B. 2. t. 3. § 46.—B. 1. t. 4. § 10.

A treatise of crimes, subjoined to Regiam Majestatem, in which the criminal judges and their respective jurisdictions are enumerated, mentions 'Earls, Lords, and Barons, with-'in their own baronies and territories.' Title 8. §. 7.

Lord Stair, after observing that lands were sometimes erected into Lordships, Earldoms, &c. adds, 'All which 'are but more noble titles of a Barony, having the like feu-'dal effects.' B. 2. t. 3. § 45.

See Forbes's Decisions, 9th July 1713, Duke of Montrose v. Macaulay of Ardincaple.—Stat. Malc. II. c. 10. 14. § 3. 4. 5.—Reg. Maj. I. c. 1. § 4.—III. c. 1. § 7.—IV. c. 1.

(*i*) See "The form and manner of Baron Courts."—Macdouall, B. 4. t. 16.

the court of the ſheriff; from the Comes, therefore, to the Vice-Comes, that magiſtrate who is affirmed to have been his deputy (*k*). During the ignorant ages, blind chance and bodily ſtrength, not right reaſon and plain juſtice, were often employed by the law to pronounce on property and on guilt; yet a Baron was not permitted to hold a court for trial either by ordeal or by battle, unleſs the ſheriff, or officers appointed by him, attended to ſee that matters were conducted with fairneſs: A regulation, made in the ſtatutes of William, which in the reign of Alexander II. was extended to all caſes (*l*). Hence Dukedoms and Earldoms, as well as Lordſhips and Baronies, were often erected into regalities; a denomination which conveyed to their owners the power of ſheriffalty in civil matters (*m*). The eſtate belonging to the family of Sutherland, which had been a Comitatus ages before the year 1347, was then erected into a regality by David II. (*n*). The Earldom of Wigton was raiſed to a like juriſdiction in 1342 (*o*).

SECT.

(*k*) Reg. Maj. I. c. 5. III. c. 22.—Qu. At. c. 13. § 6. 7. 8. c. 55.—Form of Baron Courts, c. 15. § 6. &c. c. 16.

(*l*) Stat. Wil. c. 16.—Stat. Alex. II. c. 14.

(*m*) Stair, B. 2. t. 3. § 62. 63.—Macdouall, B. 2. t. 3. § 95. 96. 97. B. 4. t. 15. § 1. 2. 7.—Erſkine, B. 1. t. 2. § 11. t. 4. § 2. 7. 8. 25. 26. 27.

(*n*) Suth. Appen. N°. 2.

(*o*) Crawfurd's Peerage, title, WIGTON.

SECT. VI.

In Scotland the Intention of conferring noble Titles on Lands was not to beſtow on their Owners inelective Seats in Parliament.—Peerages were not introduced till the Year 1587.

or to beſtow on them inelective ſeats in parliament.

IN a feudal country, divided into ſmall principalities, each governed by an independent potentate poſſeſſed of a military force entirely at his own command, the ſupreme power could not be lodged in a ſingle perſon, or be reſolved entirely into his arbitrary will. The Sovereign, the liege Lord of all the land, might poſſeſs an authority conſiderably higher than others; but, in matters concerning the community, would be obliged to take counſel with the great body of his people, without whoſe aid obedience and execution could not be obtained to his decrees or to his enterprizes. In the annals of the North it is recorded to have been declared by a ſtatute of Finnan, that the King ſhould do nothing in the public adminiſtration of his realm without the advice of his nobles, and that it ſhould not be lawful for him either to make war or to conclude

peace without the consent of his captains and of the tribes (*p*).

Those, who would chiefly be consulted by him, no doubt, would be the rich and the powerful landholders, whose sentiments would carry a weight proportionable to the extent and the populousness of their territories. In consequence, the eminent Barons, by whose concurrence the acquiescence of others might probably be commanded, would be the persons, who would commonly attend, or whose attendance would be mostly expected, in the national council. The right of session would not however be confined to them. Among inferior ranks, bold active turbulent spirits are often found, to whom personal talents give an importance above their native condition; and oppositions may sometimes be excited to superior personages either by parties formed within their dominions, or by alliances contracted with foreign foes. In the convention of the states a great chieftain would find his influence increased by the number of his adherents; men, ready to support his measures by their swords as well as by their voices. Hence the privilege of sitting there would naturally be annexed to property, but could not at first be defined

(*p*) Boet. l. 2. p. 22. l. 1. p. 6.—Buchanan, l. 4, c. 15.—Balfour's Practics, p. 678.

fined with preciſion: An order, however, was at laſt ſet to it.

Every freeholder, or "owner of lands held of the crown in chief," was entitled, as well as bound, by the laws, to ſit and to vote in the parliament of Scotland; and a diſtinction was not anciently made in this reſpect between large or valuable, and little or inconſiderable eſtates. The matter concerning the ſuffrage or the commiſſioners of boroughs belongs not to my argument. Election and repreſentation were very late of being introduced into counties. It was not till the year 1587, that a ſtatute, eſtabliſhing both, excluded the freeholders from ſitting in perſon. The view therefore, with which fiefs were erected into Lordſhips, Earldoms, Marquiſates, and Dukedoms, could not be to beſtow inelective feats on their owners. The proprietors of the freeholds, raiſed to theſe dignities, were poſſeſſed of this privilege before their elevation; and a right which accompanied their property, and which was already enjoyed by them, could neither be given, nor be intended to be given, by the King: An obſervation, immediately connected with another which will perhaps ſurpriſe thoſe who are not accurately acquainted with the primitive frame of our legiſlative body.

Titles of honour, and degrees of nobility, as well

well as distinctions of rank, were early known in Scotland: But, my Lord, I suspect that before 1587 they had not in this country any dignities entitled to be denominated peerages.

Peerages not introduced till the year 1587.

In ancient times, attendance in parliament was accounted a burden, not esteemed an honour. All vassals, who held their lands of the Sovereign, were bound to assist with their counsel in that high court: And this service opening not a road either to preferment or to pleasure, a great unwillingness, not wholly unnatural, was very generally entertained to discharging an obligation, which could not be fulfilled without travelling, perhaps from the remotest regions of the kingdom, and during tempestuous weather, at a considerable expence, by paths almost impassable, and through a country exceedingly barbarous, not affording tolerable accommodations, or infested by hostile names. Performance of it was obliged to be compelled by penalties; and fines were imposed on those who absented from their duty. It is not therefore in itself likely, that men would covet an attainment, which, instead of bringing advantages, bound to a labour from which people were generally solicitous to be exempt.

A peerage I understand to be "a state or dig-"nity merely personal, which confers, on the "persons elevated to it, an exclusive and a here-ditary

"ditary right to fit and to vote in the legiflative "body, by blood, and without election." Till 1587, every freehold, fmall as well as great, undignified as well as dignified, beftowed that right. The view, therefore, in which, before 1587, titles were granted to men, could not, no more than that of conferring nobility on lands, be to confer on them hereditary voices in parliament. The rarity of objects, and even the difficulty of acquiring them, both enhance their value, and augment the eagernefs with which they are purfued: Commonnefs, and the increafed facility with which, in confequence of it, things can be procured, detract from their eftimation: And almoft every perfon who chofe might obtain a feat without fuing to Majefty for the favour. A fingle acre, an eafy purchafe, beftowed a good qualification; and an ordinary poffeffion, attainable by all the world, could not form either a rare diftinction or a prized acquirement.

Dukes, Marquiffes, Earls, Lords, Barons, Freeholders; all enjoyed hereditary places in the fupreme convention. The characteriftical difference, by which thofe ranks were diferiminated from each other, could not confift in a common quality which pertained equally to them all. Either every proprietor of a fief held of the King muft be afferted to have been lord of a peerage,

or

or you will not find that order in the old parliaments of Scotland. The Barons (*q*) and the Freeholders, it is univerſally allowed, were merely commoners. The other members; the Lords, (*q*) the Earls, the Marquiſſes, and the Dukes; might

(*q*) In England, a Baron ſignifies a Lord, or nobleman of the loweſt order of peerage. But every perſon, at all converſant in the law and the language of Scotland, knows, that a barony there does not imply nobility; that a baron, in the proper ſenſe of the word, means an owner of a landed eſtate united under this particular denomination, and is generally underſtood rather of a commoner than of a peer; and that the term is often uſed, even in a larger ſignification, for any proprietor of ground. Leg. Malc. II. c. 1. and Skene's note on that paſſage.—Craig, l. 1. d. 12. § 16.—Skene, word *Baro*.—Stair, B. 2. t. 3. § 2. B. 3. t. 6. §. 9.—Macdouall, B. 2. t. 3. § 83. 85.—Erſkine, B. 1. t. 3. § 3. B. 3. t. 8. § 17.—Parl. 1427. c. 102. Hawthornden, in his account of the preparations which were made by James V. towards the end of his reign, for invading England, ſays, "The Earls "of Caſſillis, Glencairn; Lords Fleming, Somerville, Er- "ſkine; Barons Ayton, Langton, Ormeſton, Waughton, "and many others, accompanied with the King's domeſtic "ſervants, ride to the weſt-borders:" And in the next page, ſpeaking of the defeat of the Scots, he adds, "The "Earls of Caſſillis and Glencairn; the Lords Maxwell, "Fleming, Somerville, Oliphant, Gray; Robert Erſkine, "ſon to the Lord Erſkine, Oliver Sinclair; the lairds of "Craigy, Ayton, Langton, Ormeſton, Waughton, many "of the King's domeſtic ſervants, were taken priſoners:" p. 294. 295.—Pitſcottie, p. 288. 300.—Parl. 1489. c. 28. Parl. 1597. c. 276.

be noble; but, conſidered in their legiſlative relation, could not be peers. In fact, I believe that no inſtance can be produced of any nobleman, who was not poſſeſſed of conſiderable landed property, and, of courſe, entitled to ſit in the ſenate, before his elevation to that degree.

The Scotch parliament, your Lordſhip knows, conſiſted of three different eſtates; the ſpiritual faculty, or the clergy; the landed intereſt, or the barons; and the trading people, or the burgeſſes: And the nobility, inſtead of ſitting there in a houſe by themſelves, or of forming an eſtate diſtinct from the other eſtates, conſtituted a part of that compoſed by the landed intereſt, of all the freeholders indiſcriminately, nobles as well as commons.

All the three eſtates met in one chamber. The members formed only one houſe. Their names were entered in one roll: And even their votes were commonly given promiſcuouſly. One Speaker preſided over the whole: The ſpeeches made in parliament were all addreſſed to one preſident: And this dignity was at laſt annexed to the chancellorſhip (*r*).

Each eſtate poſſeſſed a diſtinct authority, and, independent of the other two, might hold conſultations apart by itſelf, on any matter brought before

(*r*) Parl. 1641. c. 50.—Parl. 1661. c. 1.

before parliament. The individuals present, who belonged to it, on gathering the sentiments of the body, which were both determined and collected by majority of voices, might dissent from resolutions taken by the other two bodies, and, by exerting that right, could put a negative on any act proposed by them. No bill, from which any one estate, or a majority of it, entered a dissent, could pass into a law. But, my Lord, in this particular the Peers enjoyed not a corporate capacity: Even the whole body, concurring in one unanimous voice, possessed not the prerogative of control. Their suffrages were mingled among those of the other freeholders; and no superiority pertained to the nobles in that respect. For many years after 1587, the nobility had not yet been severed from the gentry. It was not earlier than 1689, that, on the abolition of Episcopacy, they were finally (s) erected into an estate distinct from both the barons and the burgesses.

Men accustomed to read, in the Scotch history, of persons distinguished by the appellations of Lord and of Earl, I doubt not, will startle at finding it asserted, in contradiction to prejudices strongly imbibed by them, that even in the sixteenth century, Peerages existed not in Scotland. Used to behold hereditary seats acquired through

(s) Parl. 1640. c. 2.

the medium of them, people are apt to imagine an intimate connection to have anciently ſubſiſted between that privilege, and thoſe ſame titles to which they find it united in their own days; and to conclude, that the former always conſtituted the pre-eminence intended to be conveyed by the latter. But your Lordſhip's free ſpirit is not leſs attached to truth, than your uncommon accuracy is incapable of confounding with each other objects, which, however reſembling, are in themſelves eſſentially different; and the few remarks already made, will be perceived by your penetrating mind to be concluſive on that aſſertion. Every freehold, before 1587, gave an inelective ſeat in parliament: That court conſiſted of three eſtates: The nobility formed only an incorporated part of that eſtate, which was compoſed indiſcriminately of all the freeholders; and they poſſeſſed no more than a numerical proportion of the aggregate authority belonging to the collective body of Barons. Theſe facts are not probable conjectures merely; they amount, my Lord, to deciſive proofs, that in ancient times an order of men, who can juſtly be termed Peers, exiſted not in Scotland. Every particular recorded about that ſenate, thoſe which are trivial, no leſs than thoſe which are important, concur to eſtabliſh the propoſition. Several ſtriking circumſtances,

which

which ſeem hardly explicable on any other ſuppoſition, and which therefore will be admitted to confirm it, ſhall afterwards (*t*) be mentioned. Meanwhile, your Lordſhip muſt have anticipated the concluſion to which that principle leads, and which renders it of moment: I mean, my Lord, that from the way in which titles of honour deſcended before the year 1587, no juſt inference can be drawn concerning the line in which peerages of parliament are deſcendible at preſent; or, in other words, that in determining on claims entered to the latter, little, or rather no regard ought now to be paid to ancient poſſeſſion of the former. The ſubſtantial dignities, which in our days are enjoyed by the hereditary counſellors of the Engliſh crown, and which aggrandize them, are materially different from thoſe honorary appellations which were borne of old by the Scotch nobles; and a concluſive argument cannot be brought from things which had an exiſtence to ſuch as were not in being (*u*.)

(*t*) B. IV. (*u*) See Note (A) at the end of the volume.

SECT. VII.

Their only Effects were to bring to their feudal Owners Rank and Titles.

but merely to raiſe them in rank.

FIEFS were not ennobled in order to beſtow on their owners either inelective ſeats in parliament, or any juriſdiction higher than ordinary; and inanimate ſubſtances, on which nobility is conferred, cannot derive any pleaſure from their exaltation. But men, on ſurveying their elevated property, and on transferring their thoughts from it to themſelves, feel an increaſed ſatisfaction from their connection with it. On comparing their own with any neighbouring eſtate, they remark, with complacency, that others ſeem abaſed by its elevation; and, in the reſpect with which they find themſelves regarded, perceive with delight the effects produced on the minds of thoſe who inſtitute a like compariſon. The honorary appellations, therefore, which were conferred on lands, muſt have been intended to reflect a luſtre on their Lords: And, from the manner in which theſe honours operated, it will appear to have been by reflection alone that they made

made any addition to the dignity of the favourites to whom the noble grounds belonged.

A man to whom lands, erected into an Earldom, pertained, was proprietor of an eſtate diſtinguiſhed by that name: The owner of a fief, raiſed to a Dukedom, enjoyed an eſtate denominated a Dukedom: In that diſcriminating circumſtance conſiſted the whole honour belonging to each: And, inconſiderable as the diſtinction may ſeem to be, advantages, which are not yet deſpiſed, were reaped from it.

Eſtates, which had already been formed into Baronies, were often erected into Earldoms, and Earldoms were frequently advanced to Dukedoms. But Lordſhips, Earldoms, Marquiſates, and Dukedoms, differ only in name both from Baronies and from each other. The ſame privileges, judicial and feudal, are alike implied in them all; and an extenſion of power, or an enlargement of right, could not be derived from any of them. Something, however, in itſelf different, muſt have belonged to each ſpecies; and the denomination, by which alone they are diſtinguiſhed among themſelves, is the only thing in which that difference could conſiſt. The different appellations, therefore, aſſigned to fiefs, muſt have been arranged in diſtinct orders, which roſe in regular gradation above one another; and

a peculiar rank muſt have been annexed to each of them.

In all caſes in which another rule obſtructs not natural principles in their operation, a precedency, correſponding to the dignity of an eſtate, is commonly allowed to its proprietor. The degree conferred on it, forming a part of the complex perception, excited in all who behold its owner, and who reflect on his connection with it, paſſes by an eaſy tranſition to himſelf; and his rank, as ſoon as a determinate place had been aſſigned to the various denominations of property, would be regulated by it. A perſon, to whom an Earldom belonged, would be ſuperior to a perſon who had no more than a Lordſhip, becauſe his eſtate enjoyed an appellation admitted to be higher: One, whoſe lands were incorporated into a Marquiſate, was ſuperior to both: A man, who owned a fief elevated into a Dukedom, was exalted above all the three: And their different ranks would probably be influenced, at their firſt aſſignment, by the greater value, or larger extent, commonly poſſeſſed by thoſe eſtates which were raiſed to each denomination, or rather would be originally adjuſted with more facility on account of it. Craig affirms (*x*), that, among our forefathers, ſuch as poſ-

(*x*) De feudis, L. 3. d. 7. § 9.—Pet. of the Earl of Sutherland, p. 135.

poſſeſſed three caſtles were alone deemed Barons; an aſſertion, for which he cites not any authority. A ſimilar rule is ſaid by Perezius (*y*) to have been followed at ennobling ground in France and in Germany. Perfect regularity, however, can hardly be ſuppoſed here to have ever obtained in Scotland. Among us probably it was always in the power of the Sovereign to confer on any parcel of lands, ſmall as well as great, ignoble as well as noble, any degree agreeable to his Royal inclination. But all princes, even the moſt abſolute, find themſelves under a neceſſity to keep ſome meaſures in diſtributing their favours, which ſhould otherwiſe loſe much of their eſtimation: And it ſhould have conſiderably leſſened the honour done to their eminent property, in the eyes of the mighty noblemen to whom it belonged, to behold an equal dignity beſtowed capriciouſly on any diminutive eſtate. A decency was obliged to be obſerved in nobilitating lands; and eſtates erected into higher denominations were generally both more valuable, and more extenſive, than naked freeholds, or even than plain baronies. On that diſcriminating circumſtance their reſpective precedency might poſſibly be founded at firſt ſettling it; and having been once fixed, it would be conſtantly allowed, as well as eaſily

(*y*) L. 12. Cod. t. 1. De dignitatibus.

eaſily diſtinguiſhed, afterwards. An owner of lands united into a Barony acquired at firſt a higher rank, and came to be of more conſequence, than a mere freeholder, not only becauſe his juriſdiction was ampler, but alſo becauſe his eſtate was generally larger, and he was united to an order deemed ſuperior on that account. In like manner, one whoſe property was erected into a Lordſhip ranked before a ſimple Baron, becauſe he was poſſeſſed of an eſtate which gave him dominion over more dependents and a wider territory. Even among perſons equal in degree, difference of fortune, a ſplendid object, whoſe image, mingling itſelf in the fancy into the compound idea of its poſſeſſor, modifies every view taken of him, is often felt to caſt the balance in the article of reſpect.

The foregoing principles account alſo for the origin of that gradation in which noblemen roſe above and deſcended below each other, or for the rank held by them among themſelves, as well as above commoners. It might often happen that two or more Lordſhips met, either by deſcent or by purchaſe, in one perſon, or that one perſon was proprietor both of a Lordſhip and of a Barony, or perhaps that he owned a Lordſhip and ſome other eſtate. Theſe eſtates, on account of their unuſual magnitude, were incorporated into

one

one great tenement, for distinction termed an Earldom, which came thence to be deemed a higher denomination; and being more valuable, or perhaps comprehending more than one Lordship, it naturally gave its owner a superior rank to a Lord, as well as to a Baron, as it included a superior or overplus estate, together with one of the inferior denomination.

Not precedency only; titles also, flowed from nobility conferred on lands. Their denomination indeed passed, perhaps more easily than their degree, to their owners, as it is more natural to mark things which are immoveable by generic appellations expressive of their peculiar qualities, than to conceive them holding a rank, or changing it; and the one would on that account be transferred from them with more facility than the other. The owners of Lordships, of Earldoms, of Marquisates, and of Dukedoms, possessing fiefs differing from each other as well as from Baronies in name, and taking place according to the order of these, it was both convenient and natural to distinguish by terms proper to each. The titles assumed by them were possessive nouns, derived, according to the analogy of language, from those bestowed on their lands; and imported no more, than that the persons who bore them were proprietors of estates which had obtained dignities of the same appellation.

The titles of Duke, Marquis, Earl, and Lord, were no more than terms reciprocating to Dukedom, Marquisate, Earldom, and Lordship; to which they were appendant; denoting owners of fiefs dignified with these denominations; on whom they were accordingly bestowed.

In

In this way fiefs advanced to honours conveyed to their owners great rank and high titles; the only ſuperiority which could here be acquired: And it is certain that both were actually derived in that reflex manner from them. In Scotland Nobility was conferred either, firſt, by patents beſtowing particular titles, a correſpondent dignity, and them only, on perſons intended to be ennobled; or, ſecondly, without writs, by inveſtiture performed with ſolemnity in parliament; or, thirdly, by the erecting of lands into Earldoms, or into other denominations eſteemed noble. Patents were either not known, or little uſed, in that country, till the reign of James VI. The form of creating Lords in parliament probably was not introduced before James I. returned from England into his own dominions: And lawyers, as well as antiquaries, are generally agreed, that the laſt mode is the moſt ancient of all the three in which titles of honour were acquirable there (*z*). In Scotland honours and a title were implied in a certain ſpecies of property: The eſtate of a perſon, intended to be advanced

(*z*) Acts of Sederunt 1740.—Sir George Mackenzie of Precedency, ch. 8.—Memorial for Simon Lord Fraſer of Lovat.—His information and other papers in the ſuit concerning that peerage.—Papers in the competition about the Peerage of Sutherland.—Niſbet's Heraldry, V. 2. p. 4. c. 8.

ced to the degree of an Earl, was raiſed by the Sovereign to an earldom: The nobility, implied in this dignity, paſſed to the proprietor of the eſtate: Its owner was commonly denominated an Earl (*a*): That title, and all the honour pertaining to it, were univerſally allowed to him: And it is eaſy to perceive how they would naturally follow on the erection of lands into the denominations correſponding to them.

A perſon, to whom a barony belonged, was termed a Baron, as the word FREEHOLDER reciprocates to FREEHOLD. This title, if it may be called a title, was not however conferred on him by the Crown, either in the charter by which his lands were incorporated into that dignity, or by any ſeparate deed expreſsly creating him a Baron, aſſigning him a place for his ſtyle, and ordering him to be diſtinguiſhed by it; but was ſpontaneouſly beſtowed by the people, or uſed at mentioning him in diſcourſe and in writing, merely becauſe he was proprietor of a piece of ground erected into a Barony (*b*). Among the commiſſioners named by parliament for levying a ſupply granted to the Crown in 1690, you may obſerve Baron Mackcorquodale; the

(*a*) Craig, L. 1. d. 12. § 23. 25. d. 10. § 16. L. 3. d. 7. § 9.—Macdouall, B. 2. t. 3. § 83. 84. B. 1. t. 2. § 30.—Eſſay, HONOUR, DIGNITY. (*b*) P. 106. 121. above.

the only perſon indeed whom I have found deſcribed in a ſtatute after that manner (*c*): And the commoners, entitled to vote in electing a member to ſerve in parliament for any ſhire, are always deſcribed, in the books in which they are ordained by law to be enrolled, the Barons and Freeholders of that county.

A man, who owned a thanedom, was called a Thane; an analogy equally obſerved in other titles. It would be tedious to go over them all. The firſt Dukes who exiſted in Scotland were a ſon and a brother of Robert III. This Prince created David, his eldeſt ſon, Duke of Rotheſay; a dignity ſtill retained by the heir apparent of the Britiſh Crown: His brother, Robert, was made by him Duke of Albany (*d*). That honour, Buchanan remarks, had never proved fortunate to any elevated to it. He and Boece relate, in an affecting ſtory, diſtinguiſhed by circumſtances uncommonly mournful, that the Duke of Rotheſay was ſtarved at Falkland to death (*e*): The

(*c*) Parl. 1690. c. 6. The perſon, intended under that deſcription, probably was Duncan Mackorquadel of Phantilands, parl. 1704. c. 4.

(*d*) Fordun, l. 15. c. 4.—Boet. l. 16. p. 348.—Major, l. 6. c. 6. 7.—Buchanan, l. 10. c. 4.—Rymer, VIII. 35. 45. 54. 57. &c. 65. 69. 332.

(*e*) Fordun, l. 15. c. 12.—Boet. l. 16. p. 350.—Buchanan, l. 10. c. 10. Hawthornden. p. 22. 46.—Hume, c. 18. —See The Bard of Mr Gray, II. 3.

The heir of Albany perifhed at Stirling by the hands of the executioner. Alexander Stewart, a fon of James II. on whom the title was next conferred, in return for an important deliverance wrought by him to his royal brother, was unjuftly accufed and condemned for high treafon; but having, with the refolute affiftance of one faithful attendant, overpowered in the caftle of Edinburgh, and burned in a great fire the bodies of the guards charged with the cuftody of his perfon, and by that defperate effort effected in a critical moment his efcape the night preceding the morning fixed for his execution, fled from the ax into France and into exile, there to meet his fate at a tournament from the accidental fplinter of a fpear (*f*). His nephew James Stewart, to whom James III. had granted the Dukedom of Rofs, dying in the bloom of youth, lived not to enjoy the lucrative places beftowed on him (*g*): And David Lindfay, who from Earl of Crawfurd was promoted in 1487 to be Duke of Montrofe, having taken party with the King in the fields of Sauchie, was divefted of this dignity on the acceffion of James IV. and, being deprived of his offices and of his influence, retained the title for life only (*h*). Albany, Rofs, Mon-

(*f*) Pitfcottie, p. 154. 155. (*g*) Crawfurd's Officers of State, p. 58. 59. (*h*) Hawthornden, p. 168.

Montroſe, exhauſt the liſt of thoſe who had been exalted to that high degree before the demiſe of James V. but its ill fortune ceaſed not to purſue it after the ſucceſſion of Mary. Her huſband, Henry Stewart, on whom alſo the rank of Duke was conferred, wanting talents to keep the looſe heart which he had gained, fell ſoon after his exaltation a victim to her inconſtancy, to her reſentment, and to luſt. The profligate aſſaſſin, into whoſe arms a ſoft, but imperious, paſſion impelled her with a celerity equally deciſive and indecent, was raiſed by that princeſs to the ſame honour, and the Duke of Orkney died in miſery and in priſon, abhorred by the world, and infamous in Denmark. The laſt perſon, advanced to this title before the death of Buchanan, was Eſme Stewart, the Duke of Lennox, whoſe ſudden elevation, with Arran's unbounded ſway over a weak mind, produced that bold conſpiracy, which was formed by a few zealous noblemen to make a violent ſeizure of the perſon and of the government of the King at the caſtle of Ruthven (*i*). But our hiſtorian lived not to record or to behold the fall and the baniſhment of that favourite. The only Marquis, whom I can diſcover before Hamilton and Huntly were promoted

(*i*) Crawfurd's Officers of State, p. 330.——Melvil's Mem. p. 256. &c.

ted to that rank in 1597 (*k*), is James, ſecond ſon of James III. who was created by his father Marquis of Ormond (*l*). The firſt perſon, raiſed to the dignity of Viſcount, appears to have been Thomas Erſkine, a favourite of James VI. who, in the myſterious tragedy acted at Perth in the year 1600, having ſlaughtered, with his own hand, Alexander Ruthven, brother of the innocent Earl of Gowrie, was directly made Lord Dirleton, and afterwards, in 1606, Viſcount of Fentoun. Lords were probably firſt ennobled in parliament during the reign of James I.: And the title of Earl is unqueſtionably the moſt ancient of all thoſe uſed at preſent in the nation (*m*). To avoid repetition, therefore, in explaining my argument, I ſhall apply it to this title only.

Eſtates more favoured and perhaps larger than baronies, or perhaps ſeveral baronies, were united into one tenement termed an Earldom (*n*); and the perſon, connected with it in the relation of owner, was thence ſtyled Earl, becauſe he was the Comes, an expreſſion by which no more was meant than the owner of an Earldom. In this original ſenſe the word is underſtood in many ancient charters (*o*).

(*k*) Anderſon's Collections, preface, p. 41.

(*l*) Ad. Caſe of the Counteſs of Sutherland, ch. 4. p. 57.

(*m*) Sir James Dalrymple's Collections, p. 146.—See note (B) at the end of the volume.

(*n*) Or Comitatus.

(*o*) See note (C) at the end of the volume.

At preſent a title and a ſtyle are always aſſigned to perſons ennobled in the royal writs elevating them to that ſtate, but were ſeldom ſpecified in old times; and a clauſe, either particularizing thoſe by which the patentees ſhould in future be diſtinguiſhed, or authoriſing the noble grantees to aſſume them, was much oftener omitted than inſerted, at leaſt till James V.'s acceſſion in 1513; a proof that a title and a ſtyle were implied in a particular ſpecies of property.

In a great number of ancient charters, in which comitatus are granted by the Crown, not a ſyllable is found concerning the honours; yet they carried the dignities, as well as the lands, to the perſons in whoſe favour thoſe deeds were made. The Earldom (*p*) not only is the ſole thing expreſſed in them; the lands alſo of which it conſiſted are ſpecified in the grants; and it, as well as they, are deſcribed to have corporeal boundaries and a local ſituation; evidence that lands are alone intended both by the Latin COMITATUS and by the Engliſh EARLDOM (*q*). This is their pro-

(*p*) Or Comitatus.

(*q*) Charter of the Earldom of Roſs granted by David II. in 1371, printed in Suth. Appen.—Charter of the Earldom of Sutherland granted in 1455, by James II. alſo printed there: Totum et integrum comitatum de Sutherland, cum pertinentiis, jacentem infra vice-comitatum noſtrum de Inverneſs

proper technical meaning, and in this ſenſe both words ſhall generally be uſed in the ſequel. A Peerage, an incorporeal right, cannot be bounded by marches, or ſituated in a county: But an empty title might, much more eaſily than a high juriſdiction, be an appendant of a noble fief which had been exalted to a correſpondent appellation.

Robert I. the brave Prince, whoſe name is ſtill remembered in Scotland with exultation, on account of a ſplendid victory gained by him at Bannocburn, over an Engliſh army commanded by Edward II. was powerfully aſſiſted in maintaining poſſeſſion of the Scotch crown by his ſiſter's ſon, Thomas Randolf, an excellent governor, as well as celebrated warrior, of this kingdom. In 1312, that King executed a charter, by which he erected a vaſt territory, the lands belonging to him in Murray, into an Earldom, and made them over in favour of his nephew (*r*). The expreſ- Murray.

 ſions

verneſs—tenendum et habendum dicto Joanni Sutherland filio et heredibus ſuis, de nobis et ſucceſſoribus noſtris, in feodo et hereditate in perpetuum, per omnes rectas metas ſuas antiquas et diviſas, prout jacet in longitudine et latitudine, cum tenandiis, &c.

(*r*) That charter has often been publiſhed. See cartulary of Murray, p. 91.——Eſſay, Honour, Dignity.——Appen. brief, IX.

Stronger

ſions uſed there ſhew, firſt, That Randolf had not been an Earl before the deed was granted; for in

Stronger and livelier impreſſions are always produced by particular objects than by general expreſſions or even ideas. The conviction of the genuineneſs of the facts aſſerted in the text, the force of the arguments brought in it, and the evidence of the concluſions deduced from them, I am ſenſible, would have been rendered much greater, by ſubjoining, all along, during my progreſs, the paſſages of the books, and the words of the deeds, to which I refer, than they can be without them. But the increaſed bulk, to which my work ſhould have ſwelled from the inſerting of theſe quotations, obliged me to deprive both myſelf and others of that advantage.

It is not improper alſo to take notice, that I have not had acceſs to ſeveral charters and other deeds which are cited by me. All the acquaintance I can pretend to have with their contents, has been derived from printed copies or printed extracts. The facts, however, which I give on their authority, I hope will be found pretty exact. An immenſe collection, both of inſtances and of writings, relative to Scotch Peerages, has been made in ſome intereſting ſuits concerning them; and is eſpecially preſerved in the papers that were put into the Court of Seſſion in an action which was brought in Scotland about 1730, between Simon Lord Lovat and Hugh Mackenzie of Fraſerdale, concerning the dignity of Lord Fraſer of Lovat; and in thoſe exhibited to the Houſe of Lords, in a conteſt maintained about 1766—1771, between Lady Elizabeth Sutherland and Sir Robert Gordon, concerning the Earldom of Sutherland; the grand repoſitories from which much knowledge is derivable on this ſub-

in the beginning of it he is named Thomas Randolf, Knight, without any addition: Secondly, That he was not thereby created an Earl; for the charter contains no words conferring either title or dignity upon him: Thirdly, That the lands granted to Randolf had not formerly belonged to him; for they are described by the King, OUR LANDS IN MURRAY: Fourthly, That they are united into an Earldom, together with all the privileges pertaining to it: After which, it is remarkable, fifthly, That even in the grant itself he is incidentally intitled Comes. This charter is the only right which Randolf had to the dignity of Earl of Murray; a title, under which from his martial atchievements, as well as from his domestic administration, he is well known both in the Scotch and in the English history, and which was transmitted by him to his posterity (*s*).

subject, and to which frequent appeals are made by me, as the instruments, as well as examples produced in them, were very accurately examined by the gentlemen engaged in those great causes. Hence one may rely with much assurance on facts, which on a full examination appear to be vouched by them: And in citing those cases, I mean the proofs quoted in them, not the cases themselves.

(*s*) Fordun, l. 12. c. 19. 24. 26. 37.—L. 13. c. 2. 4. 12. 13. 18. 19. 22. 23. 24. &c.—Pitscottie, p. 47.—Rymer III. 582. 924. 926. 1017. 1022. 1025. 1030. IV. 670. 682. 700. 761.

Marjory Stewart, eldeſt daughter of Robert the Steward of Scotland by his beloved wife Eliſabeth Mure, beſtowed herſelf in marriage, Boece ſays, with a precipitation hurtful to her reputation, on John Dunbar, a ſecond ſon of the Earl of March. Nevertheleſs that Prince, after he aſcended the throne, to which his claim had been warmly ſupported by the family of Dunbar, granted to them, and to their iſſue, the Earldom or eſtate of Murray; which, probably on the failure of heirs-male of the body of the Regent to whom the ſucceſſion was limitted by Bruce, perhaps alſo on a reſignation made by one of its owners, had then reverted to the Crown; and a part of it was anew erected by the King into the ſame dignity in their favour. In conſequence, John Dunbar was ſtyled Earl of Murray. In Fordun, in Boece, in Major, in Buchanan, in all our hiſtory, that title is given him; and under it his behaviour at the battle of Otterburn is not leſs celebrated than the death of Douglas, or the bravery of Percy (*t*).

Boece's expreſſions are remarkable. Robert II, he ſays, gave lands to his ſons: John he made

(*t*) Fordun, l. 14. c. 36. 53. 54.—Boet. l. 16. p. 340. 344.—Major. l. 5. c. 24. l. 6. c. 3.—Buchanan, l. 9. c. 59. 61.—Record of Charters, B. 1. N° 309.——Ad. Caſe. ch. 4. p. 44.—Pitſcottie, p. 48.—Rymer, VII. 338.—Lovat's Anwers, p. 20.

made Earl of Carrick, Robert Earl of Fife, Alexander Lord of Badenoch, David Earl of Strathern, Walter Earl of Athole (*u*).

The Earldom of Caithneſs, which belonged to Walter Stewart, Earl of it, having been forfeited to the Crown for his acceſſion to the barbarous murder of his royal nephew, was conferred by James II. on George Crichton, Admiral of Scotland. George Crichton, to whom the noble fief pertained, became Earl of Caithneſs (*x*). Caithneſs.

In 1562, Queen Mary granted the Earldom of Murray to her brother Lord James Stewart, Prior of St Andrews. It is not improbable that the title of Earl of Murray was directly given him in the world by thoſe who approached his perſon: But is ſcarcely to be expected that any written document which proves the fact can be produced, or even exiſt, as in another charter, by which the Queen, only eight days after the former, conveyed to him the Earldom of Marre alſo, her pleaſure was ſignified, that he ſhould carry the ſtyle of Marre; which was accordingly borne by James, till this Earldom was ſurrendered by him to the Crown. The Prior was no ſooner diveſted of the eſtate, than, relinquiſhing the title Murray. Jan. 30. 1561-2. Feb. 7. 1561-2.

(*u*) Boece, l. 16. p. 340.—Note (C) at the end of the volume. (*x*) Record of Charters, B. 4. N° 290.—Pitſcottie, p. 93. 105.—Hawthornden, p. 95.

of Marre, he assumed that of Earl of Murray, to which however his pretensions depended entirely on the deeds (*y*) that granted the lands to him. He is that Murray, the virtuous Regent, who bore so memorable a part in all the important transactions of those days (*z*).

Rofs. Henry Stewart, the young Lord, who, amidst a warm competition of powerful rivals, had the rare felicity of winning the affection of the most beautiful and most accomplished Princess of her age, obtained from Queen Mary, during her fond moments (*a*), before the celebration of their nuptials, May 15. 1565. a charter, granting to him the lands comprehended in the Earldom of Rofs, and re-erecting them into the same honour in his favour. This charter contains not a word about the title (*b*), which, nevertheless, was enjoyed by him. In another

(*y*) Charter, 30th Jan. 1561-2. and Charter, 7th Feb. 1561-2.—Charter, 22d Jan. 1563. and Charter, June 1566.—Records of Parl. 1567. and of Parl. 1592.

(*z*) Ad. Case, c. 6. p. 100.—Appen. Brief, XXIII.—Buchanan, l. 17. c. 26. l. 19. c. 54.—Keith, p. 215. 216. 222. 224. 226. 520. 525. &c.—Parl. 1563. c. 1. 24. Parl. 1566.

(*a*) Parl. 1567. c. 19. 20.—Spotswood's Pastoral Letter published in Keith, p. 591.—Parl. 1579. c. 10.

(*b*) Record of Charters, B. 32. N° 431.

another charter, dated only ten days after the former, that nobleman is ſtyled Earl of Roſs (*c*). May 25. 1565. July 20. 1565.

The only things either directly or expreſsly conferred in the foregoing inſtances, and in many others which might be quoted, are the noble fiefs: Yet the perſons to whom theſe were granted bore the titles correſponding to the denominations given to their eſtates. Hence, in old charters, the title and the dignity of Earl are ſometimes aſſerted to be appendants of an Earldom, and enumerated among the privileges belonging to an eſtate raiſed to this denomination (*d*).

In thoſe days they ſeem to have apprehended it to be ſcarcely poſſible for an Earl to exiſt without a Comitatus, lands erected into an Earldom. In 1458, James II. by the Biſhop of Brechin, his Chancellor, declared in parliament his purpoſe Morton.

(*c*) Record of Charters, B. 32. N° 500. 458.—Ad. Caſe, c. 4. p. 46.—Keith, p. 281.

(*d*) Robert I. conveyed to his brother Edward Bruce the Earldom of Carrick, together with the name, the right, and the dignity of an Earl, and all other liberties, commodities, eaſements, and appendants, belonging to that Earldom: 'Totum Comitatum de Carrick, per omnes rectas metas 'et diviſas ſuas, cum nomine, jure, et dignitate Comitis, et 'cum omnibus aliis libertatibus, commoditatibus, ayſiamentis, et juſtis pertinentiis ad dictum Comitatum ſpectantibus.' Appen. Brief, XIV.—Fordun, l. 12. c. 30. 32.

poſe of creating Lord Dalkeith an Earl, with the ſtyle of Morton. Lord Borthwick, who heard this declaration, imagining that the lands of Morton were meant to be granted to Dalkeith, roſe, and, after obſerving that they belonged to his ſiſter Lady Dalkeith and her ſon William Douglas, beſeeched his Majeſty that nothing might be done prejudicial to their right in them. The Chancellor anſwered, That it was not propoſed to confer on Lord Dalkeith a title in that Earldom for the lands of Morton in Nithſdale, but for thoſe of Morton in Caldercleir. It muſt then have been underſtood, that, at carrying the Royal intention into execution, it was neceſſary to raiſe the lands of Morton to the dignity of an Earldom, and to veſt them in the perſon ennobled (*e*).

Roſs, &c. James Stewart, ſecond ſon of James III. had, at different times, obtained from his father grants of the lands which formed the Dukedom of Roſs, the Marquiſate of Ormond, the Earldom of Ardmanach, the Lordſhip of Brechin, and the Lordſhip of Navar, and enjoyed the titles correſponding to them (*f*). But, under an excellent tutor, Shaw

(*e*) Ad. Caſe. c. 4. p. 55.

(*f*) Record of Charters, B. 9. N° 43. 23d Jan. 1480-1. N° 60. 12th April 1481—Records of Parl. 29th Jan. 1487-8.—Crawfurd's Officers of State, p. 58.—Ad. Caſe, c. 4. p. 56.—Parl. 1489. c. 25.

Shaw abbot of Paiſley, having acquired ſomething in itſelf perhaps little leſs valuable, a high reliſh of the tranquil and ingenuous pleaſures of literature and of philoſophy, that young Prince choſe to embrace the ſpiritual vocation; and having been promoted, at an age hardly canonical, to the Archbiſhoprick of St Andrew's, and to the Commendatorſhip of the Abbey of Dunfermline, two great eccleſiaſtical preferments, as well as to the office of Chancellor, propoſed to ſurrender his temporal eſtates to his brother James IV. This ſtep, it was foreſeen, would diveſt him of the honours derived from thoſe lands: Therefore, in the inſtrument of reſignation, a particle of each fief, ſtill to bear the noble denomination proper to its rank, was excepted from the ſurrender, and reſerved to his Grace, in order to preſerve to him the dignities reciprocating to them (*g*).

(*g*) Inſtrument of reſignation and reſervation, quoted in Ad. Caſe, c. 4.

SECT.

SECT. VIII.

Dignities and Titles, derived from noble Fiefs, on alienation paſſed along with the Eſtates from the former Proprietors to the new Acquirers.

IN exact conformity to the foregoing principles, we find, that in ancient times eſtates erected into honours, on alienation, carried the dignities annexed to them from the former to the new owners; and that the titles or ſtyles, no leſs than the juriſdictions and other rights, went along with the lands. A gentleman, on ſelling his Barony, ceaſed to be a Baron. This conſequence follows on a transfer or ſale even at preſent; and it has already been proved, but ſhall afterwards be further eſtabliſhed, that, in old, much leſs diſparity ſubſiſted between a Barony and other dignities than is commonly imagined in our days. Accordingly, a perſon to whom lands erected into an Earldom belonged, on alienating the eſtate, ceaſed to be ſtyled Earl, becauſe in fact he was no longer Comes, or owner of the Earldom; and that title paſſed to the perſon to whom the dignified fief was conveyed,

as

as he was now become the perſon to whom the Comitatus pertained (*b*).

In 1371, Thomas Fleming, Earl of Wigton, ſold to Archibald Douglas, Lord of Galloway, a conſiderable territory ſituated in Galloway, which in 1342 had been granted by David II. to Sir Malcolm Fleming (*i*), a nobleman diſtinguiſhed by his loyalty to the deſcendants of Bruce, and which had been erected in his favour by that Prince into an Earldom, named the Earldom of Wigton. Men, after the honours enjoyed by their families have become legally extinct, forbear not always, even in the caſe of forfeiture, to uſe the ſtyles borne either by their anceſtors or by themſelves, and others, being ſeldom diſpoſed to diſpute trifles which do not intereſt them, rarely refuſe to confer acceptable appellations on thoſe commonly diſtinguiſhed by them: But it ſeems well authenticated, that Thomas Fleming, after ſelling the lands incorporated into the Earldom of Wigton, reſumed the ancient appellation of his family, and ceaſed to be termed Earl of Wigton. In the deed of ſale executed by him in 1371, Wigton.

(*b*) Craig, L. 1. d. 12. § 23. 25.: d. 10. § 16.: L. 3. d. 7. § 9.—Macdouall, B. 2. t. 3. § 83. 84.: B. 1. t. 2. § 30.—Eſſay, HONOUR, DIGNITY.——See note (D) at the end of the volume.

(*i*) Charter in Crawfurd's Peerage, title WIGTON.

1371, he is denominated Earl of Wigton; but, in a Royal charter granted by Robert II. in 1375, he is called Thomas Fleming of Fulwood, formerly Earl of Wigton (*k*): And none of his heirs either carried or pretended to the dignity, till John Fleming, from the rank of Lord Fleming, which Crawfurd says had been conferred on his great-great-great-grandfather by James II. was raised by letters-patent in 1606 to the higher degree of Earl of Wigton. It does not appear with certainty, that Archibald Douglas, the purchaser, assumed this title. The house of Douglas had already obtained to their estate the degree of an Earldom: That noble family was peculiarly marked by a barbarous pride, and maintained a deadly feud with the Flemings: The Earldom of Wigton formed only a small particle of the extensive country called Galloway: And Thomas Fleming, overborne by the superior power of its ancient possessors, found himself at last obliged to part with it. Under these circumstances, it was not unnatural for one, nearly allied to a dignity which would probably be esteemed higher, to despise an inferior appellation. Archibald Douglas's father had borne the title of Earl of Douglas: His elder brother had no lawful issue: The Lord

(*k*) Thomas Fleming de Fulwood, dudum Comes de Wigton.—Fordun, l. 14. c. 3.—Ad. Case, c. 4. p. 50.

Lord of Galloway thence had a probable prospect of inheriting their honours: A starchness and an austerity, strongly denoted in the very epithet (*l*) which, among a race not celebrated for gentleness of manners, has been particularly affixed to his name, marked his deportment and his character; and a man, whose daughter was married to the heir apparent of the Scotch crown, and whose spirit had rejected Ducal rank with scorn (*m*), might propose, by forbearing to assume the title of Wigton, to express contempt both of that acquisition, and of those whom his severity had compelled to surrender it. Perfect regularity is not constantly observed in the titular names carried by noble families; and all the titles, to which noblemen possess an indisputable right, are seldom recited, either in writs in which they are occasionally mentioned, or even in deeds granted by themselves. It is not extraordinary, therefore, that no documents are now extant, which prove Archibald Douglas to have taken the title of Earl of Wigton: But is not unlikely that he bore it at least in deeds immediately relating to that estate, and is certain that one of his descendants took it;

a

(*l*) Archibald the Grim, or, the Grim Douglas.

(*m*) Buchanan, l. 10. c. 4. 5.—Major, l. 6. c. 7.—Boet. l. 16. p. 349.—Fordun, l. 15. c. 10. 11.—Rymer, VIII. 694.

a proof, that it was underſtood to belong to his family.

Buchan. In 1406, Robert Stewart, the Duke of Albany, who was a long time regent of Scotland, conveyed the Earldom of Buchan, then his property, to his ſon John Stewart. In the charter which completed the transfer, he is ſtyled Duke of Albany, Earl of Menteith, and Earl of Buchan: But, in another charter, granted within two days, by which he confirmed the former, he ceaſes to term himſelf Earl of Buchan (*n*). This title, as well as the lands, had gone to John Stewart, the grantee of the Earldom. During the wars, waged in France by Henry V. with a ſucceſs of which Engliſhmen are ſtill fond to boaſt, ſeven thouſand auxiliaries were ſent by the States of Scotland, under the command of this nobleman, to the aſſiſtance of the Dauphin, who reigned afterwards
1419. under the name of Charles VII. On that expedition, young Stewart is reported, with his own hand, to have killed, at Baugé, the Duke of Clarence, brother of the King of England. On account of the bravery diſplayed, and ſervices rendered by him there, Mezerai ſays, the Dauphin beſtowed the ſword of Conſtable on the Earl of Buchan; and under this title he is numbered among

(*n*) Ad. Caſe, ch. 6. p. 155.—Crawfurd's officers of ſtate, p. 307.

among thoſe who fell in 1424, at the battle of Vernueil. Archibald Douglas, grandſon of the Lord of Galloway, was one of the volunteers who on that occaſion paſſed into France, and chooſing, in a foreign country, in which his quality could not be univerſally known, to carry that title which ſhould readily convey a high idea of his elevated degree, you find him in the French, as well as the Scotch hiſtorians, ſtyled Earl of Wigton (*o*).

An old writer, whoſe natural ſtyle and peculiar ſimplicity, wanting not nerves and clearneſs, render his portraits ſtriking, and even his narration entertaining; in his Memoirs of the Brothers of James III. draws with a coarſe pencil a ſtrong picture of the eldeſt, Alexander Duke of Albany. "This Alexander," ſays he, "was of "mid ſtature, broad-ſhouldered, and well pro- "portioned in all his members, and ſpecially in "his face; that is to ſay, broad-faced, red-noſed, "great-eared, and of very awful countenance, when "he pleaſed to ſhow himſelf to his unfriends:" March.

L He

(*o*) Fordun, l. 15. c. 18. 31. 33. 34. 35.—L. 16. c. 25.—Boet. l. 16. p. 356.—Major, l. c. 6. 9.—Buchanan, l. 10. c. 20. ſqq. c. 43. ſqq.—Leſlie, VII. 259.—Hawthornden, p. 33. 34.—Mezerai on the years 1421, of Charles VI. and 1424 of Charles VII. of France.—Hume, ch. 19. 20.—Rymer, VIII. 735.: IX. 48.: X. 308. 332.: XI. 326.

He "loved nothing so well as able men and good "horse:" "was hardy, manly, and wise;" and on account of his great prowess, and of his other excellencies, was generally esteemed, and even feared, by the turbulent Barons of the times. Having been appointed by his father Warden of the east Marches, Pitscottie observes, that he "had in his hand at that time the castle of Dun-"bar, with the living thereof pertaining to the "Earl of March;" but that Lord Home, under pretext of his high office of Great Chamberlain of the Crown, would not suffer the tenants of the estate to pay their rents to the Duke; and that Alexander, "commoved with the same, spared "not to ride the ground-bounds and lands of the "said Earldom of March, and there uptake the "said profits and duties at his own pleasure." On this slender connection Alexander is entitled, by Pitscottie, and even in statutes, Earl of March, as well as Duke of Albany (*p*).

Orkney & Caithness.

In 1455, William Sinclair, the Earl of Orkney, who erected the beautiful chapel still standing at Roslin, obtained from James II. a grant of the Earldom of Caithness; after which he was styled Earl of Caithness, as well as Earl of Orkney. About 1471, the Earldom of Orkney was sur-

ren-

(*p*) Pitscottie, p. 132. 133.—Parl. 1434. c. 151.—Parl. 1455. c. 47.—Parl. 1483. c. 106. § 3.—Rymer, XI. 423.

rendered by him to the Crown; and being thereby divested of the estate, he laid aside the title belonging to it, and was thenceforth called Earl of Caithness alone. This nobleman was Chancellor of Scotland; an office of first influence, as well as highest rank, both in the state and in the law (*q*).

Striking instances might also be brought from the ancient family of Marre: But, for reasons which will afterwards be apparent, I shall not produce them till next chapter. Meantime, your Lordship will easily perceive the import of the preceding observations.

Recapitulation.

Dukes, Marquisses, Earls, Lords; the owners of Dukedoms, Marquisates, Earldoms, and Lordships; had not, before the year 1587, a firmer right than other freeholders of the King, to sit in the national convention: The jurisdiction belonging to them was not more extensive than that enjoyed by every inferior person whose lands were erected into a Barony: The only things, in which any difference subsisted between them among themselves, were the rank and the appellation peculiar to each order: Degree and title were also the only points in which they differed from those commoners who were Barons. They were

(*q*) Ad. Case, ch. 4. p. 45.—Crawfurd's Officers of State, p. 34.—See note (E) at the end of the volume.

Definition.

therefore no more than a ſuperior ſpecies of the people, termed Lairds by the Scots. It follows, that in ancient times territorial honours were 'Titles (r) commonly given to owners of eſtates 'raiſed to the denominations correſponding to 'them, and implying precedency on account of 'their ſuperior extent or higher value, as well as 'of the determinate rank ſuppoſed to belong, or 'to have been aſſigned originally, to each appel-'lation.'

(r) Buchanan, l. 6. c. 52.

PART

PART II.

RULES, by which TERRITORIAL HONOURS deſcended before the year 1587.

THE preceding definition leads to important concluſions, which will illuſtrate the genuine nature of thoſe ancient dignities, and, if juſt, will confirm the foregoing account of them, as each propoſition, deduced from it theoretically, ought then to be found agreeable to fact; and in this way the conſequences, which ſeem on an accurate argument to follow from it *à priori*, will be completely eſtabliſhed analytically by experiment. Theſe propoſitions are no more than corollaries implied in the general principle, 'That 'titles or honours were anciently incorporated 'parts of noble fiefs raiſed to the denominations 'reciprocating to them.'

SECT. I.

Before 1587 *Territorial Honours, accompanying the Noble Lands, were descendible with them to Heirs-general, female as well as male.*

FIRST, then, I observe, that, in all cases, prior to the year 1587, in which lands were erected into earldoms or other dignities, or in which honorary titles were derived from noble fiefs, the honours were descendible to heirs-general, female as well as male, to whom the grounds raised to them devolved. Every part of any thing must equally belong to its owner; and women appear never to have been incapable, in Scotland, either of holding property in lands, or of succeeding to them. The styles or the titles, being incorporated parts of the dignified estates, could not be separated, more than the proprietary jurisdictions annexed to them, from the integral subjects in which they inhered: And it is no objection, that these implied a right to sit in parliament; for of old every species of free-hold subjected to the same burden.

An estate erected into a barony was anciently, and

and ſtill is, deſcendible, in the ordinary courſe of legal ſucceſſion, to heirs-general, no leſs than a ſimple freehold. The perſon, to whom the barony belongs, is the only one who can be termed the Baron; and a female, proprietrix of a barony, is entitled to the rank as well as the power implied in this denomination: Nevertheleſs, a woman could not formerly, no more than ſhe can now, ſit in parliament; a privilege, however, appurtenant to her freehold. That incapacity was perſonal and temporary only, ariſing from her ſex: But ſhe could exerciſe every right appendant to her eſtate, which was exerciſable by a female. She could alſo tranſmit her barony, with every privilege annexed to it, unimpaired, either to her heirs, or to purchaſers; and theſe became fully entitled to enjoy it in all its amplitude, as ſoon as they ceaſed to be diſabled by minority, by ſex, or by like cauſes. No other heir, male or female, could poſſibly be the Baron, or have any right to this appellation, as the barony, in which that title inhered, belonged not to him: No perſon could be either entitled to a ſeat, or bound to ſerve in parliament, by virtue of a freehold pertaining to another: One could not claim over another's grounds a juriſdiction conferred on their owner alone: And it is impoſſible to point out any privilege, higher or lower, annexed to

the eſtate, which a perſon different from its proprietor could poſſeſs on a barony, belonging not to himſelf, but to her.

From Baronies a tranſition is eaſily made to Earldoms, which indeed were no more than a higher order of Baronies, differing from them only in name and in rank. Lands exalted to this elevated dignity were not limited to heirs-male, but, like ſimple freeholds, were deſcendible at common law to heirs-general: The perſon, therefore, female or male, who happened by ſucceſſion to become owner of a Comitatus, being the Comes, could not fail, more than one who acquired it by purchaſe, to be denominated Counteſs or Earl, and would be allowed both the title and the precedency due to the proprietor of an eſtate raiſed to this honour. A female, indeed, to whom the nobilitated lands devolved, could not give counſel, or perform ſervice in parliament: No more could a Baroneſs or a Freeholdrix; yet that right was inherent in the one dignity as much as in the other: Women could not ſerve in the field; they were not, however, diſabled on that account from inheriting fiefs held by military tenure: Even juriſdiction is not exerciſable by them in perſon; but they are not incapable of enjoying lands to which it is annexed: And they could always tranſmit their eſtates,

eſtates, together with the whole appendants of them, to their heirs, as well as preſerve them entire.

A principle, in itſelf evident, needs not be confirmed by examples. Scotch hiſtory, as well as old records, are full of them. Almoſt all the ancient Earldoms of Scotland were territorial honours. The eſtates, belonging to the perſons who poſſeſſed thoſe dignities, are conſtantly found, in the words uſed to deſcribe them, to have been erected into Comitatus of the denominations borne by their owners; and, in every inſtance, titles correſponding to them were carried by thoſe who enjoyed the dignified lands.

Carrick. In 1270, on the death of one of thoſe enthuſiaſtic ſpirits who engaged in the delirious adventure of the Cruſades, Adam Earl of Carrick, in that holy land which he had marched from the fartheſt region of the weſt to deliver out of the unhallowed hands of the Infidels, the Earldom of Carrick devolved to his only daughter Margaret, who not only poſſeſſed the eſtate, but bore the title of Counteſs of Carrick. This Lady, one day a-hunting, caſt eyes on Robert Bruce, ſon of the Lord of Annandale, and being captivated by his appearance, prevailed on him, not without a reſiſtence on his part, to accept of an invitation to her caſtle of Turnberry. The impaſſioned fond-

fondneſs, diſcovered by thoſe forward advances, produced not the reſilient averſion which behaviour leſs indelicate might have had on a mind either more ſuſpicious or leſs ſuſceptible than that of Bruce. A marriage was ſoon concluded between them. Their eldeſt ſon was that gallant King, Robert the firſt of Scotland: And this Prince having obtained, on the death of his mother, a proper right to the Earldom, was diſtinguiſhed, before his acceſſion, by the title of Earl of Carrick (*a*).

Fife. On the death of Duncan Macduff, the thirteenth Earl of Fife, heir-male lineally deſcended from that Macduff who killed Macbeth, and who is rendered famous even in England by Shakeſpeare's tragedy, Iſabel, his only child, ſucceeded him in the eſtate, and was univerſally acknowledged Counteſs of Fife. In this character ſhe ſurrendered the Earldom, that a new grant might be made of it by David II. to her ſecond huſband Sir Thomas Biſſet (*b*), a Royal favourite, thereby to fruſtrate a prior ſettlement which had been ex-

(*a*) Fordun, l. 10. c. 24. 29. l. 11. c. 13. &c.——Boet. l. 13. 14.—Winton, c. 139.—Major, l. 4. c. 12. 13. 17. &c. —Buchanan, l. 8. c. 7. 8. &c.—Rymer, II. 178. 189. 266. 471. 614. 643. 714. 988. 997. III. 620.—Dalrymple's Collections, p. 363. &c.—Mackenzie's Cond. p. 7. and Lovat's Anſwers, p. 11.—Ad. Caſe, ch. 5. p. 18.

(*b*) Fordun, l. 6. c. 53.

executed by her father. But in 1371, under the title of Counteſs of Fife, after all her huſbands had died, ſhe entered into an indenture, in terms agreeable to the former deſtination of her lands, engaging to reſign the Earldom, and to ſettle it on her kinſman Robert Stewart Earl of Menteith. The Earl of Menteith, having in conſequence ſucceeded to the lands, was thenceforth ſtyled Earl of Fife, as well as Earl of Menteith, and retained that title even after he had become Duke of Albany. His ſon, Murdoc, alſo bore it. At the coronation of James I. Murdoc exerciſed the privilege, belonging to him in that character, of placing the King in his chair of ſtate, and of putting the crown on his head, at the ceremony of his inauguration: And it was by his forfeiture that the palace of Falkland, the ſeat of the family, and the reſt of the Earldom, came to the Crown (*c*).

Among all the noble families of whoſe high anti- Marre and Douglas.

(*c*) Sibbald's Hiſtory of Fife, p. 97.—Crawfurd's Officers of State, p. 301. 307.—Anderſon's Diplomata, N° 57. 61. 63.—Fordun, l. 11. c. 22. l. 14. c. 49. 51. 52. 53. 55. l. 15. c. 4. 37. l. 16. c. 2. 9. 10.—Boet. l. 16. p. 340. 344. 346.—Buchanan, l. 9. c. 64. l. 10. c. 8. 27. 28. 47.—Leſlie, VII. 262.—Hawthornden, p. 15. 19. 22. 23. 46.—Rymer, VIII. 35. 45. 635. 708. 737. IX. 45. 60. X. 298.—Mackenzie's Cond. p. 8. and Lovat's Anſwers, p. 13. 14.—Ad. Caſe, ch. 5. p. 23.—Parl. 1455. c. 43.

antiquity vanity is ſometimes apt to boaſt, the houſe of Marre ſeems to be that which can at once carry its nobility to the remoteſt period, and authenticate it by the beſt evidence (*d*). Thomas Marre, one of its ancient Earls, dying without iſſue in 1377, was ſucceeded in both title and eſtate by his ſiſter Margaret. This Lady married William Douglas Earl of Douglas; the nobleman who, on the death of David II. revived the claim which ſeniority of lineage had given his family to the crown of Scotland. Margaret, Counteſs of Marre, ſurvived her huſband: In conſequence, their ſon James, during her life, bore the title of Earl of Douglas, and on her death added that of Marre to the dignity which had already devolved to him from his father (*e*).

James Douglas, Earl of Marre and Earl of Douglas, was killed in that celebrated battle in which his troops gained, at Otterburn, a complete victory over Henry Percy and the Engliſh; and

(*d*) See note (B) at the end of the volume.

(*e*) Fordun, l. 11. c. 22. l. 14. c. 24. 36. 42. 49. 51. — Boet. l. 16. p. 340. — Dalrymple's Collections, p. 380. — Crawfurd's Officers of State, p. 298.—Mackenzie's Cond. and Lovat's Anſwers to them.—Charters, N° 2. 3. 4. 5. of Append. ſecond, produced in a cauſe determinod 9th Dec. 1762, Duke of Hamilton v. Archibald Douglas, Eſq.—Caſe of the Counteſs of Sutherland, p. 10.—Ad. Caſe, ch. 5. p. 36.—Rymer, VII. 175.

and perhaps his name is better known from the admired ballad of Chevy Chace, and from Mr Addiſon's criticiſm upon it, than from the whole body of Scotch hiſtorians, not excepting the claſſical paragraph in which Buchanan records the heroic circumſtances of his fall. On his death, without legitimate children, the Earldom and the honours of Douglas deſcended to Archibald, his brother by the father; but thoſe of Marre went to his ſiſter-german Iſabella (*f*).

In 1514, on the death of John Sutherland, Earl of Sutherland, the Earldom devolved on his ſiſter Eliſabeth, who, in conſequence of her property of the eſtate, became Counteſs of Sutherland, and tranſmitted the dignity as well as the lands to her deſcendants (*g*). Sutherland, then heir-male of the family, and lineally ſprung from the ancient Earls, pretended not to either (*h*). Sutherland.

(*f*) Fordun, l. 14. c. 53. 56. l. 15. c. 3. — Boet. l. 16. p. 345.—Buchanan, l. 9. p. 57. 58. 59.—Spectator, N° 70. 74..—Rymer, VII. 2. 45. 175. 468.—Lovat Papers, ibid. —Sutherland Caſes, ibid. — Charter, N° 5. of Append. ſecond of Archibald Douglas.

(*g*) See b. 3. § 8.

(*h*) See B. 3. § 8.—Note (F) at the end of the volume.

SECT.

SECT. II.

To Heirs-male.

IN ancient times noble fiefs did not always descend, more than other landed eſtates, to the neareſt heirs of their laſt owners. Remote males were ſometimes preferred by ſettlements to near females; brothers to daughters, uncles to ſiſters, couſins to nieces, or the like. Still, however, in caſes in which dignified fiefs went not to heirs-general, but were limited to heirs-male, the honours accompanied the property, and were conſtantly enjoyed by thoſe who ſucceeded to the lands.

Douglas. William Douglas, the ſixth earl of Douglas (*i*), by his violence and by his enormities, laid the miniſters of James II. under a neceſſity of enticing him and his brother David, by an impoſing diſſimulation of much kindneſs, into the caſtle of Edinburgh, and of ſeizing that opportunity, immediately

(*i*) That Earl of Douglas was commonly attended by a large body of horſe (Pitſcottie ſays a thouſand, two thouſand, or more; an incredible number); and even affected a ſtate equal to royalty, making knights, creating noblemen, and holding parliaments within his own territories.

mediately after having regaled them with a ſumptuous entertainment, of leading them to inſtant execution, without even the ſpecious form of a deceitful trial. On their death without iſſue, the Earldom of Douglas, in conſequence of an entail, went to their father's brother, James Douglas, the heir-male, by whom the title was accordingly enjoyed: But the large eſtates in Galloway, in Annandale, in Balveny, and in Ormond, which had been held by William in fee ſimple, deſcended to his ſiſter Beatrix, the Lady recorded for her beauty or for her fortune under the name of the Fair Maid of Galloway (*k*).

In 1452, John Stewart, Lord Lorn, ſettled his noble lands of Lorn on the heirs-male of his body; and, in default of them, on his brothers, Walter, John, Allan, and James, ſucceſſively one after another, and on other collateral males. On his death in 1469, without male-iſſue, the eſtate deſcended not to any of his daughters, but paſſed under that ſettlement to his brother Walter, who enjoyed the title, as he was owner of the Lordſhip (*l*). Lorn.

Ar-

(*k*) Pitſcottie, p. 14. 33.——Buchanan, l. 11. c. 9. 17. 18. ——Hume's Hiſtory of the Douglaſſes.—Hawthornden, p. 58. 61. 65.

(*l*) Memor. for Lord Lovat, p. 6.—Supplemental Caſe of Sir R. Gordon, p. 17.—Ad. Caſe, c. 6. p. 86.—Stewart's

Angus. Archibald Earl of Angus, a nephew of Gavin Douglas the tranſlator of Virgil, married Margaret, eldeſt daughter of Henry VII. of England; and his deſcendants ſtill inherit the crowns of Great Britain, of Sardinia, of France, of Spain, and of Pruſſia. Nevertheleſs, the title deſcended not to their daughter, Lady Margaret Douglas, wife of the Earl of Lennox, mother of Lord Darnley, grandmother of James VI. niece of Henry VIII. and firſt couſin of Queen Elizabeth. In 1547, he had deviſed the Earldom of Angus, and had taken a charter ſettling it on his heirs-male. Hence, on his death, the eſtate went to his nephew David Douglas, by whom in conſequence the dignity implied in it was poſſeſſed (*m*).

art's Hiſtory of the Stewarts, p. 169. 170.—Crawfurd's Officer's of State, p. 44.

(*m*) Hawthornden, p. 208. 209. 216.—Pitſcottie, p. 218. 233.—Lovat's Ad. Cond. p. 5. 6.—Sup. Caſe, p. 21.—Ad. Caſe, ch. 6. p. 99. 100.—Crawfurd's Officers of State, p. 75.—Charters, 31ſt Aug. 1547, 11th Nov. 1564. and 10th March 1707, and other deeds cited in Mr Douglas's Appendix.

SECT.

SECT. III.

To thoſe eldeſt Heirs-portioners, who ſucceeded to the Noble Fiefs without Diviſion.

LANDED eſtates, in all caſes in which their deſcent is not predetermined by ſettlements, but left to proceed in the courſe directed by law, in which their laſt owners leave either more daughters than one, or repreſentatives of more, and in which males exiſt not who are entitled to be preferred in the inheritance, deſcend in coparcenary, or are equally divided by branches, among all the females, and the repreſentatives of thoſe who are dead. An equal partition is alſo made by ſtems among heirs-portioners in other caſes. But if the rule be general, that in ancient times the nobility of lands accompanied the fiefs raiſed to honour, then in caſes in which, before 1587, any noble eſtate, that ſhould otherwiſe have been divided among parceners, went entirely to one of them, the heireſs, to whom the grounds belonged, muſt have enjoyed the dignity incorporated into them.

Henry Earl of Athole died without male iſſue, Athole.

but left at leaſt two daughters; Iſabel, who married Thomas of Galloway, and Fernelith, who married David de Haſtings. The Earldom went entire to Iſabel, the eldeſt, who in conſequence became Counteſs of Athole; and the dignity, as well as the eſtate, deſcended from her to her ſon Patrick Earl of Athole (*n*).

Roſs. William Roſs, Earl of Roſs (*o*), left two daughters, Euphemia and Joanna, between whom, at common law, the Earldom, on his death, ſhould have parted. The lands of Philorth were given by their father to Joanna, the youngeſt, who married Sir Alexander Fraſer thane of Cowie; and are ſtill enjoyed by Lord Salton, their lineal repreſentative. But the noble fief, in conſequence of a ſettlement made by the Earl, went all to Euphemia, the eldeſt. The charter, which followed on that deed, mentions not the honours, and is confined to the lands: The title, however, as well as the Earldom, was poſſeſſed by her, and tranſmitted to her poſterity (*p*).

Tho-

(*n*) Mackenzie's Cat. p. 1. and his Cond. p. 4.—Lovat's Anſwers to it, p. 4.—Dalrymple's Collections, p. 379.—Chart. Dunferm.——Ad. Caſe, c. 5. p. 8.——Fordun, l. 9. c. 48. 59. (*o*) Fordun, l. 13. c. 45.

(*p*) Charter, dated 23d October 1370.——Mackenzie's Cond. p. 13.—Lovat's Anſwers to it, p. 23.—Suth. Caſe, p. 10.—Suth. Appen. N° 3.—Sup. Caſe, p. 32.—Ad. Caſe, c. 5. p. 26.—Major, l. 6. c. 12.—Buchanan, l. 10. c. 31.—Leſlie, VII. p. 258.

Thomas Stewart, Earl of Angus, a deſcendant of that Lord of Bute (*q*), from whom both Charles I. and Oliver Cromwell were ſprung, died without iſſue in 1377; but he had two ſiſters, Margaret and Eliſabeth. The Earldom was not, however, divided between them. The eſtate went wholly to Margaret. This Lady enjoyed the honours, as well as the lands; and having married the Earl of Douglas, by whom ſhe had a ſon George, tranſmitted both the dignity and the eſtate of Angus from the name of Stewart to the name of Douglas (*r*). Angus.

James Stewart, the Earl of Murray, ſtill remembered under the honourable appellation of the Good Regent (*s*), was aſſaſſinated in 1571. His only children were two daughters; Eliſabeth, who married Sir James Stewart of Down, and Margaret, who married Francis Hay, Earl of Murray.

(*q*) Sir John Stewart of Bute ſlain in the great battle fought at Falkirk, to which the Engliſh army was led againſt Sir William Wallace by Edward I. in perſon.

(*r*) Mackenzie's Cond. of Inſtances, p. 1.—Cat. p. 1.—Lovat's Ad. Cond. p. 4.—His anſwers, p. 3.—Suth. Caſe, p. 10.—Sup. Caſe, p. 21.—Ad. Caſe, c. 5. p. 33.—Anderſon's Diplomata, N° 57.—Marriage-articles, 24th May 1397, and three Charters (N° 2. 3. 5.), lately publiſhed in Appen. II. for Archibald Douglas, Eſq;

(*s*) Spotſwood, p. 234.—Melvil's Memoirs, p. 206.

Errol: And, on his assassination, his Earldom was not parted between them, but, in consequence either of a settlement under which the fief stood devised at his death, of an agreement concluded after it between the two sisters, or of the early death of Margaret, the youngest, without issue, before obtaining investiture in her portion of the lands, went entire to the eldest. Elisabeth possessed the dignity, as well as the estate; and both are still enjoyed by her descendants (*u*).

SECT. IV.

To Heirs different from any of the three former Species.

IN ancient times, territorial honours were not limited in their descent to any determinate line, and did not always devolve either to the heir-general, or even to the heir-male, of the last possessor of them, but, without observing any fixed course, frequently went, in consequence of settle-

(*u*) Sup. Case, p. 20.—Ad. Case, c. 6. p. 100. 115.—Brief of Sir R. Gordon, p. 120.

ſettlements, to a perſon different from both, ſometimes to a younger ſon, ſometimes to a younger daughter. Still, however, amidſt all that variety, it ſeems pretty certain, that they were conſtantly enjoyed by the perſon, female or male, to whom the fiefs ennobled by them deſcended.

James Dunbar, Earl of Murray, had two daughters, and the Earldom of Murray was not parted between them. Janet, the eldeſt, during her father's life, married Sir James Crichton, who was eldeſt ſon of the famous Chancellor, and who was himſelf raiſed to the Great Chamberlainſhip of Scotland. The high credit poſſeſſed by her huſband and by his friends, together with her natural prerogative of ſeniority, would unqueſtionably protect her from any groſs injuſtice: Nevertheleſs, Janet got no more than the lands of Frendraught. The Earldom of Murray, probably in conſequence of a ſettlement which had been executed by her father, went entire to her younger ſiſter, Mary, a Ward of the Crown, by whom, accordingly, the dignity as well as the eſtate was enjoyed. A gift of her wardſhip was made by James II. to Archibald Douglas, who, having thereby acquired poſſeſſion of her lands, availed himſelf of the advantage afforded him by the favour of his Sovereign, to obtain her perſon Murray.

in marriage. On this occaſion the Earldom paſſed from her to her huſband. Archibald Douglas became Earl of Murray; and ſharing both in the enmities and in the fate of his brother, the Earl of Douglas, who, under a promiſe of ſafety ſolemnly contracted to him, had been enſnared into the caſtle of Stirling, and whoſe foul murder has infixed an indelible ſtain on the Royal hand which perpetrated it there, he was attainted by Parliament in 1455. On his forfeiture, the Earldom was granted by the King to Janet, and the title was a ſhort time borne by her: But being unable, in a country then intractable, in which the Gordons, her enemies, domineered, to maintain poſſeſſion of the lands, ſhe reſtored the eſtate to the Crown, and retained not the honours (*x*).

Huntley. Alexander Seton, the firſt Earl of Huntley, was thrice married. His firſt wife brought him no children. By his ſecond, Giles Hay, heireſs of John Hay of Tillibody in Clackmannanſhire, whoſe eſtate was ſtipulated to deſcend to her own off-

(*x*) Mackenzie's Cat. p. 9.—His Cond. p. 12.—Lovat's Anſwer, p. 20.—Dalrymple's Collections, p. 346.—Pitſcottie, p. 46. 47. 48. 75. 76. 80. 93.——Buchanan, l. 11. c. 26. &c.—Crawfurd's Officers of State, p. 30. 311.—Hawthornden, p. 71. 80. 83. 86. 87. 88. 89.—— Parl. 1455, c. 43. 44. p. 36.—Rymer, XI. 285. 300. 326. 334.

offspring, he had a ſon, Alexander Seton de Gordon. His third Counteſs, Eliſabeth Crichton, a daughter of the Chancellor, bore him a ſon named George; and out of reſpect to an alliance which muſt then have been reckoned honourable, as well perhaps as to prevent the extinction of either family, the Earldom of Huntley was ſettled by him on the heirs whom he might have by her. In 1450 the Earl obtained from James II. a charter, granting that noble fief, in terms of his ſettlement, to himſelf and to them. On his death the dignity devolved not to his eldeſt ſon, Alexander Seton de Gordon, but went to his ſecond ſon, George, who ſucceeded to the eſtate; and George tranſmitted both to his poſterity. Alexander Seton, the eldeſt ſon, got no more than the lands of Tillibody, which had belonged to his mother Giles Hay; and his deſcendants, who, I believe, are poſſeſſed at preſent of the barony of Touch, notwithſtanding the ſeniority of their lineage, are ſtill commoners: But the Duke of Gordon, who is ſprung from George the younger branch, inherits the honours as well as the eſtate of Huntley (*y*).

(*y*) Ad. Caſe, ch. 4. p. 45.

SECT. V.

Were borne by Huſbands in right of their Wives.

THE ſtrict union formed by wedlock eſtabliſhes a ſpecies of ſociety between every couple connected by that ſacred band. Their common children, in whoſe company both parents find great delight, and whoſe welfare their hearts are fond to promote, render their intereſts one, and, co-operating with the affection entertained by them for each other, naturally engage them to live together in the ſame houſe. A family, to be ſupported and to be governed, is thus produced by their co-habitation: And the male, excelling in ſtrength, and abler to labour, has in moſt nations arrogated to himſelf, amidſt artful appearances of much obſequiouſneſs, a real ſuperiority over the female. As his rights reciprocate to his toils, his obligations are proportioned to his abilities. The maſter of the family is bound to maintain his own houſehold; and moveables being the only things capable of being turned directly into food or into clothes, the man, in conſequence of the

the burthens to which his dominion ſubjects him, acquires the property of the whole perſonal eſtate, which either belongs to his wife at entering into marriage, or accrues to her during its ſubſiſtence. The fruits, producible by her real eſtate, being moveable, his marital intereſt implies alſo a right to poſſeſs it, and to reap them. Hence in Scotland huſbands obtained the titles annexed to the fiefs of their wives, as the poſſeſſion, the management, and the ſubſtantial advantages derivable from both, were enjoyed by the man (*z*). It is not unuſual, even at preſent, for gentlemen to aſſume the ſurnames of heireſſes whom they marry; and the additions taken by them are often borrowed from lands with which they are connected in this tranſitory manner.

Robert Stewart, the Prince by whom the realm of Scotland was governed with ſplendour till he died at the advanced age of fourſcore, was beſtowed by his father Robert II. at an early period of life, on Margaret, heireſs of the rich Earldom of Menteith, and in conſequence became Earl of Menteith; a title which was retained by him even after he had been created Duke of Albany. You find him taking it in a lofty letter, addreſſed to Henry IV. of England, in which, in the language affected by Royalty and by the Church, Menteith.

(*z*) Dalrymple's Collections, p. 220.

Church (*a*), he describes himself, "By the grace "of God, son of the King, and governor of the "kingdom of Scotland (*b*)."

Ross. His brother, Alexander Stewart, the Earl of Buchan, who burnt that beautiful edifice of which some elegant remains are still to be seen at Elgin (*c*), and whom, for that and similar violences, the clergy have transmitted to posterity under the name of the Wolf of Badenoch (*d*), espoused Euphemia Countess of Ross; a woman, whose shrewishness even his ferocity was unable to tame. Amidst the misunderstandings which arose between them, it is not likely that Alexander's pride allowed him to assume the title of Earl of Ross. But her former husband, Sir Walter Lesly, with whom

(*a*) Rymer, II. 488.

(*b*) Crawfurd's Officers of State, p. 301. 307.——Dalrymple's Collections, p. 392. 393.—Fordun, l. 14. c. 37. l. 15. c. 37.—Major, l. 6. c. 10.—Mackenzie's Cond. p. 11. and his Cat. p. 9.—Suth. Case, p. 12.—Sup. Case, p. 34.—Ad. Case, ch. 5. p. 18. 24.: ch. 7. p. 173.—Sibbald's Collections, p. 97.—Rymer, VIII. 635. 708. 737.: IX. 45. 60.: X. 298.—Anderson's Diplomata, N° 57. 61. 63. 65.——Crawfurd's Peerage, p. 100.—Sir David Dalrymple's Remarks on the History of Scotland, ch. 19.

(*c*) See a View of the Cathedral of Murray in Cordiner's Antiquities, plates 8th and 9th.

(*d*) Fordun, l. 14. c. 56.—Boet. l. 16. p. 346.—Major, l. 6. c. 6.—Buchanan, l. 9. c. 67.—Shaw's History of Moray.

whom probably ſhe had lived on better terms than with Buchan, appears to have carried it (*e*).

Alexander Stewart, an illegitimate ſon of that Earl of Buchan, is a perſonage diſtinguiſhed in the Scotch hiſtory by the variety and the ſingularity of his adventures and of his character (*f*). All his enterpriſes, even thoſe undertaken by him in his early youth, mark a maſculine and bold, but ſomewhat irregular and romantic underſtanding. His firſt public appearances were made at the head of a lawleſs banditti, by whom extenſive ravages were committed around them: And having then thrown wiſhful eyes on the ample eſtate enjoyed by Iſabella Douglas Counteſs of Marre, his ſuit was warmly ſupported by that barbarous phalanx. Laying ſiege, under their auſpices, to her caſtle of Kildrummy (*g*), the daring adventurer, by a courtſhip conducted in that rough, but Marre.

(*e*) Rymer, VII. 53. 215.—Fordun, l. 16. c. 15.—Buchanan, l. 10. c. 31.—Leſlie, VII. 258.—Ad. Caſe, ch. 5. p. 27.: ch. 7. p. 174.—Major, l. 6. c. 12.—Hawthornden, p. 27.

(*f*) It was by his vigour that, in 1411, with an army expeditiouſly collected in the counties ſituated between the Tay and the Spey, an effectual check was given, in a bloody battle fought at Harlaw, to a rebellious attempt made by Donald Lord of the Iſles, an ally of Henry IV. of England, to maintain poſſeſſion of the extenſive Earldom of Roſs. Rymer, VIII. 527. (*g*) Cordiner, p. 15.

but ardent manner, succeeded no less in winning her affection than in obtaining her person in marriage. In consequence Alexander Stewart arrived at the dignity of Earl of Marre, because in her right he was possessed of the Earldom (*h*).

Buchan. Christian Stewart, Countess of Buchan, whose father, the Master, was slain at Pinky (*i*), married Robert Douglas, a brother (by the mother) of Murray the Regent. Her husband, in her right, became Earl of Buchan, and transferred that dignity from the house of Stewart to the name of Douglas (*k*).

In

(*h*) Fordun, l. 15. c. 19. 21.: l. 16. c. 17. 25.—Boet. l. 17. p. 360.—Major, l. 6. c. 10. 12. 13.—Buchanan, l. 10. c. 18. 33. 43. 44.—Leslie, VII.—Hawthornden, p. 27. 34.—Evergreen, I. 78.—Mackenzie's Cond. p. 11.—Ad. Case, ch. 7. p. 175.—Rymer, VIII. 450. 461. 500.: X. 332. 491.—Charter, dated 20th April 1406, by Alexander Comes de Marre.

(*i*) In a battle fought in 1547, by the Scots, against the forces of England, in defence of the person of their Sovereign, whom Henry VIII. out of a just regard to the political happiness of both nations, had anxiously stipulated for his son, and whom Edward's ministers wished to compel to performance of that contract.

(*k*) Records of Parl. 1567. and 1579.—Keith, p. 452.—Anderson's Collections, II. 228.—Charter, 7th April 1574, B. 34. N° 123.—Mackenzie's Cat. p. 3.—Lovat's Answers, p. 9.—Ad. Case, ch. 5. p. 63.: ch. 7. p. 176.—Pitscottie, p. 329. 352. 356.

In 1771 it was adjudged by the Houſe of Lords, That Adam Gordon, (a ſon of the Earl of Huntley), who had married Eliſabeth Sutherland, Counteſs of Sutherland, aſſumed in her right the honours belonging to that Earldom. In private deeds, in public acts, in royal grants, in privy council, the title of Earl is given him, and he enjoyed all the privileges implied in it (*l*). Sutherland.

SECT. VI.

Were perhaps taken both by Fiar and by Liferenter.

I Am apt to ſuſpect, that in caſes in which an Earldom belonged to one perſon for life, and was held by another in fee, it was not uncommon for both the fiar and the liferenter to carry the title of Earl.

Robert Bruce, who married the Counteſs of Carrick (*m*), had children by that Lady; and having ſurvived her, either retained by courteſy a right to poſſeſs her eſtate for life, or, in conſequence of the feudal offence given by her irregular marriage to her ſuperior Lord, obtained from Carrick.

(*l*) Page 165. above.—See note (G) at the end of the volume.

(*m*) Page 161. 162. above.

from the Sovereign a grant of the Earldom to himself (*n*). During the minority of young Bruce,
1292. his father, after the death of his wife, perhaps to avoid the humiliating ceremony of proſtrating himſelf in a ſuppliant poſture, and on his bended knees ſwearing fealty to a Prince whoſe right he might be reluctant to acknowledge, a few days after Edward of England had pronounced his deciſion, diſmiſſing the claim of the Lord of Annandale to the Scotch crown, executed a deed, declaring to John Baliol, that he had ſurrendered the fief to his ſon, and beſeeching the King to accept of his homage for it. He ſeems not, however, to have made either an actual conveyance, or a formal reſignation, of the Earldom: But both Robert Bruce the ſon, and Robert Bruce the father, bore the title of Earl of Carrick. They are recorded under it among thoſe who ſwore fealty to Edward I. (*o*).

Levenax. John Stewart of Darnley, in whoſe favour a new Earldom of Levenax was erected by James III. in 1483, out of a part of the ancient Earldom of Lennox, having ſurrendered that noble fief to the Crown,

(*n*) Fordun, l. 10. c. 29.

(*o*) Rymer, II. 612. 614. 714. 859.—Pryne, v. 3. p. 653.—Knyghton, p. 2482. 2514.—Ad. Caſe, ch. 5. p. 21.—Fordun, l. 10. c. 29.: l. 11. c. 13.—Ridpath's Border-Hiſtory, p. 182.

Crown, took a new inveſtiture to himſelf for life, and to his eldeſt ſon Matthew Stewart in fee. John Stewart the father, as well as Matthew Stewart the ſon, was, during his life, termed Earl of Levenax (*p*).

George Douglas, a ſon of William Douglas and Margaret Stewart, Earl and Counteſs of Douglas and of Angus (*q*), married Mary, daughter of Robert III.; and, by a royal charter iſſued in 1389, the Earldom of Angus was veſted in his perſon, under a reſervation of the liferent of it to the Counteſs. Hence George Douglas was ſometimes termed Earl, as well as Lord of Angus, before the death of his mother (*r*). Angus.

Walter Stewart Earl of Athole got from his nephew James I. a grant of the Earldom of Strathern Strathern.

(*p*) Indenture between John Earl of Levenax and his ſon, and Eliſabeth Monteith and her ſon, dated 18th May 1490.—Charter, granted in September 1490, by Matthew Earl of Levenax to Eliſabeth Monteith.—Indenture, dated 11th July 1493, between John Earl of Levenax and John Haldane of Gleneagles;—all printed, and other papers to which appeals were made, in a cauſe determined by the Court of Seſſion, Jan. 23. 1781, General Fletcher v. James Ferrier. (*q*) See p. 164. 165. above.

(*r*) N° 3. 4. 5. of Appendix II. of Archibald Douglas, Eſq;—Indenture 1410, cited in Lovat's Ad. Cond. p. 5.—Ad. Caſe, ch. 5. p. 33.—Sup. Caſe, p. 21.—Anderſon's Diplomata, N° 57.

Strathern for life, and in consequence added the title of Strathern to the other dignities possessed by him (*s*).

Buchan. John Stewart Earl of Buchan, after having divested himself of the property of the Earldom in favour of his son, still retained the title, in consequence of the interest which he had reserved in the estate, during life; notwithstanding that his grand-daughter Christian Stewart (*t*), who, on the death of her father, had been directly seised in it, was exercising the rights which were then supposed to be annexed to the fee (*u*).

SECT. VII.

Became extinct on the partition of the dignified Fief among Co-heiresses.

IF the foregoing principles be founded in truth, every cause, by which an estate was deprived of its nobility, must have effected an extinction of the honours annexed to it. In ancient times a doubt appears to have been entertained

(*s*) Ad. Case, ch. 5. p. 57. (*t*) See p. 180. above.
(*u*) Ad. Case, ch. 5. p. 60. 61. 62.

tained by lawyers, whether, on the alienation of part of a parcel of lands which had been united into a Barony, the piece which was reserved, as well as the part which had been alienated, did not lose the quality of union, and the other privileges implied in that condition: But it seems not to have ever been thought that each of the portions of a landed estate, which had descended to coparceners, and which had been parted among them, still retained the same feudal dignity which had belonged to the whole tenement before its division. After a partition, no solid reason can be assigned for bestowing a preference on any one of the shares above others, exactly co-ordinate to it in every respect, nor any view which can determine imagination or judgement to that partiality. Probably, therefore, titles of honour became extinct as soon as the fief, into which they were incorporated, devolved to coparceners, and was divided among them. It is true, that in the case of the succession of portioners, things which are impartible are commonly held, in Scotland, to go to the eldest of the co-heiresses. This rule, however, always supposes objects which are not extinguished, and applies only to rights, such as patronages, offices, and perhaps superiorities, which form existent parts of the inheritance, and at the same time are in themselves really indivi-

ſible. It extends not to territorial honours, which are annexed to lands, and which are derived from them. A noble fief is always ſuſceptible of an actual diviſion, no leſs than ignoble grounds; and it cannot reaſonably be ſuppoſed, that a dignity, originally conferred on a large extent of territory adequate to ſuſtain it, was intended for each diminutive fraction into which it might be broken in a progreſſion of generations. Nevertheleſs, the maxim, by which among parceners a preference is allowed to ſeniority in a ſmall degree, might ſometimes be adopted in the caſe of honours, either from favour, from neceſſity, or from acquieſcence, and is ſufficient to account for thoſe rare inſtances, if any are to be found, in which heirs-female, not poſſeſſed of the whole dignified eſtate in conſequence of ſettlements executed by their anceſtors or of bargains made with their coparceners, enjoyed the titles originally appendant to their entire Lordſhips.

Caithneſs and Orkney.

Magnus Earl of Caithneſs and Orkney, a perſonage who in the fourteenth century was reckoned a great man, but whoſe name is ſcarcely remembered in the preſent, died without male iſſue; and left four daughters, co-heireſſes, among whom his eſtate was divided. On his death the dignity became extinct (*x*).

Duncan

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(*x*) Lovat's Anſwers to Mackenzie's Cond. p. 10.

Duncan Lennox, Earl of Lennox, overwhelmed, at the age of eighty, in the ruin which, after the reſtoration of James I. befell the friends of Albany (*y*), was executed at Stirling in 1425. His eldeſt daughter, Iſabel, whom the Duke had married, ſurvived all their children; and on her death the Earldom of Lennox, which had not forfeited, deſcended to her two ſiſters, (Margaret, who married Robert Monteith of Ruſky, and Eliſabeth, who married Sir John Stewart of Darnley), among whoſe deſcendants the eſtate appears to have been parted. In conſequence the title became extinct (*z*). Lennox.

William Herries, Lord Herries of Terreagles, who died in 1543 without male-iſſue, left three daughters, co-heireſſes of his fortune; Agnes, who married Sir John Maxwell; Catherine, who married Alexander Stewart of Gairlies; and Janet, who married William Cockburn of Skirling. The honours, however, deſcended not to any of the three; and Archibald Herries of Madinpenny, the heir-male of the family, did not pretend to them. Herries.

(*y*) See p. 163. above.

(*z*) Fordun, l. 16. c. 9. 10.—Major, l. 6. c. 12—Leſlie, VII. 262.—Buchanan, l. 10. c. 28.—Hawthornden, p. 19. 20.—Mackenzie's Cat. p. 7.: His Cond. p. 9.: Lovat's Anſwers to them, p. 14.—Douglas's Peerage, p. 397. 398. 399.

them. The dignity remained dormant, or rather extinct, till Sir John Maxwell and his Lady, probably in consequence of a contract with their sisters, acquired a right to the whole estate; and the lands of Terreagles had been anew erected, in 1566, into a Lordship, in favour of him and her, and the heirs-male of their bodies. After this erection, Sir John bore the title of Lord Herries; under which he is marked in the roll of those who sat in the great parliament of 1567 (*a*).

SECT. VIII.

Became extinct on the devolution of the Noble Fief to the Crown.

TITLES annexed to lands became extinct, in case the noble fiefs, from which they were derived, went to the Crown, either by forfeiture, by escheat, by succession, or otherwise: An

(*a*) Lovat's Answers to Mackenzie's Cond. p. 32.—Mackenzie's Remarks on them, p. 35.—Lovat's State, p. 13.—Sup. Case, p. 20. 27.—Ad. Case, ch. 6. p. 89.—Keith, p. 146. 277. 309. 317. 335. 377. 378.—Keith's Appendix, p. 130. 131.—See note (H) at the end of the volume.

An event of which innumerable examples are found in hiſtory, as from the irregularity, the diſjointedneſs, and the debility, of the government, from the temerity, the haughtineſs, and the rapacity, of the gentry, and from the poverty, the barbariſm, and the ſubjection, of the commons, few countries have been more incident than Scotland to inſurrections, and even to rebellions.

One of the moſt memorable revolutions recorded in its annals is that which, towards the end of the thirteenth century, enſued on the demiſe of Margaret, the Fair Maid of Norway, whoſe beauty is ſo fondly remembered in the Scotch Legends. Important queſtions concerning the legal ſucceſſion to feudal dignities came to be occaſionally diſcuſſed in the illuſtrious competition to which that mournful event gave riſe: And as the judgement ultimately pronounced in it was productive of great changes both in the honours and in the property of many families in Scotland, the examples, to be cited in proof of my preſent propoſition, may not improperly be introduced with a ſhort account of that grand revolution. By this, perhaps not impertinent digreſſion, a little relief will be afforded to your Lordſhip from genealogical deductions.

On the death of Queen Margaret, twelve competitors laid claim to the vacant throne; and,

aware of the decisive importance of Edward of England's favour, they were every one, especially those who had most reason to be diffident of the solidity of their title, solicitous to gain his protection. Cumberland, after that province had been ceded to Malcom II. (*b*), had been held, by the Scotch Princes, of the Crown of England (*c*): The direct dominion of his whole kingdom had been surrendered by William the Lion, with the advice of his Barons and of his Clergy, to Henry II. (*d*): And homage had frequently been performed by the Kings of the North for the fiefs held by them in England, and even for the realm of Scotland, to Henry and to his successors (*e*): This right had indeed been distinctly renounced by Richard I. (*f*): But ten thousand marcs, the price stipulated, was a consideration inadequate to the splendid dignity with which his generous heart had parted; his power to alienate, without the authority of parliament, a signory annexed to his crown, might not be perfectly indisputable; and

(*b*) Fordun, l. 4. c. 26.—Boet. l. 11. p. 225.—Buchanan, l. 6. c 18. (*c*) Hume, ch. 2.

(*d*) Rymer, II. 562. &c.—Fordun, l. 8. c. 24.—Buchanan, l. 7. c. 47.

(*e*) Dalrymple's Annals, I. 119. 136. 146. 153. 163. 182.—Rymer, II. 126.

(*f*) Fordun, l. 8. c. 48. 49. 50. 54.—Buchanan, l. 7. c. 49.—Dalrymple's Annals, I. 131.

and in thoſe days the Engliſh nation had not entirely abandoned pretenſions, which were ſtill aſſerted, or attempted to be revived, about the beginning of the preſent century. Under theſe circumſtances, it could not have excited ſurpriſe, if an ambitious monarch either had been ſeduced, by a ſeeming repetition of a like recognition, to claim, or had graſped at any favourable opportunity to recover, that ſuperiority, whoſe dazzling brilliancy, producing in his vivid fancy a livelier image than obſcure facts or illegible deeds, might miſlead his reaſon, or overcome the feeble reſiſtance made by its accuracy; and it is not at all unlikely that Edward was impreſſed with a confident belief in his own right to the feudal ſovereignty of Scotland. But, fortunately for him, the competitors and their partizans were little leſs forward to admit, than himſelf was eager to aſſert, his claim; and an invitation (*g*), which, it is probable from ſome evident ſymptoms of an apprehended civil war, had been well intended (*h*), was given him to ſettle, by his amicable interpoſition, the ſucceſſion to the Scotch diadem. With the unanimous conſent, or tacit approbation, of the grandees of the nation, their

(*g*) Fordun, l. 11. c. 2. — Boet. l. 14. p. 303.—Buchanan, l. 8. c. 9.—Leſlie, VI.

(*h*) Ridpath, p. 169.—Dalrymple's Annals, I. 196.

June 3. 1291. feveral pretenſions were ſubmitted by all the claimants to his deciſion (*i*): And the pains, the impartiality, the moderation, and the fidelity, with which the Engliſh Juſtinian heard, examined, determined, and performed the engagements contracted by him in, that ſplendid cauſe (*k*), have been ill requited by the injuſtice and the virulence with which his character and his memory have been loaded and purſued by the Scotch hiſtorians, who, in oppoſition to ſtrong evidence afforded by actual honourable behaviour, have here very generally aſcribed to a Prince, peculiarly diſtinguiſhed by dignity of conduct and by loftineſs of mind, all the littleneſs of diſſimulation, and meanneſs of cunning, ever practiſed by a tricky pettifogger in a provincial town. Had Edward been conſcious of the entire iniquity or perfect frivoloufneſs of his claim, an underſtanding, leſs piercing than his, ſhould alſo have foreſeen that the Scots would never acquieſce peaceably in it. The acquiſition for which he is here charged to have ſacrificed his honour, in the caſe of great kingdoms, is productive rather of a ſhowy ſuperiority, than of thoſe ſubſtantial profits ſometimes derivable from it in the caſe of private eſtates; and as powerful Kings ſeldom ſcruple, on very inadequate

(*i*) Rymer, II. 529. (*k*) Rymer, II. 553. &c.

quate grounds, to make a cruel ſport of human kind in war, his bold ſpirit would not probably think of ſeeking, in that ſlender connection, a handle for hoſtilities, for which, if he can inconſiſtently be ſuppoſed to have been meditating immediately to commence them, his good ſenſe would teach him, that ſpecious pretexts, ſufficiently according with faſhion, might always be invented, and that real force would effectually releaſe him from an indiſpenſable obligation of finding even a plauſible apology. As he muſt have foreſeen that a rupture would inevitably be produced by the reſiſtance of the Scots, he would not have contented himſelf with the attainment of a bauble, but have perfidiouſly availed himſelf directly of the manifeſt advantages of which his good fortune had already put him in poſſeſſion. An ignoble ſoul, in order at leaſt to lengthen the duration of the fiduciary regency which had precipitately been devolved on him, on pretences always eaſy to be found by any who ſeek for them, would have protracted the determination of the cauſe. But the right to a kingdom was finally ſettled by his award in a ſhorter time than is often conſumed by an inferior court in determining a ſuit about a few ſhillings of ſilver or acres of moor. The definitive judgement, after much anxious conſultation, (*l*), pronounced by him in favour Nov. 17. 1292.

(*l*) Rymer, II. 589.

favour of Baliol, was in itſelf exactly conſonant to law. Monarchs whoſe authority is not limited, in the preſumptuouſneſs of power, often pretend, by ceſſions of provinces intruſted to their charge, to diſpoſe of the political obedience of the rational agents who inhabit their territories; and ſubjects are commonly neceſſitated, from an impotence cauſed by diſunion and by timidity, to ſubmit to the new maſters to whoſe rule they are arbitrarily transferred, no leſs than to other indignities put on them, without their conſent. Few nations, however, reliſh the diſmemberment of their empire: An abſolute power was never lodged in the Scotch Kings; and being here little more than perpetual plenipotentiaries commiſſioned among other things to treat on national intereſts with foreign potentates, they were obliged to regulate their conventions by the principles implied in the form of polity eſtabliſhed in their dominions. The Scots would not probably have acquieſced in an adjudication, by which their kingdom had been parcelled into ſmall independent principalities: And Edward aſſumed not a power, which was not intended by the ſubmiſſion to his arbitration to be veſted in him. The regal dignity of Scotland, an incorporeal object, was adjudged by him, agreeably to its own nature, as well as to a cuſtom invariably ob-

obſerved in that and in other ſtates, to be an indiviſible inheritance (*m*): And as, in order to enſure the execution of his ſentence, moſt of the principal fortreſſes of the country, and even the country itſelf, had been delivered into his cuſtody (*n*), it would plainly have been far eaſier for him to have then retained poſſeſſion of the defenceleſs and divided kingdom, than to effect a conqueſt of it, after his troops had been withdrawn to a diſtant quarter, and a King, the rightful heir of the royal race, had been aſſigned, by prejudices and by authority, to unite the force, and to direct the operations, of the enemy. Nevertheleſs, the caſtles, which had been put in his hands, were faithfully ſurrendered by his order: Scotland was evacuated by his ſoldiers: A conteſt, from its object ſo intereſting to thoſe engaged in it, was terminated rightfully without the effuſion of any blood: Seiſin of the kingdom was immediately given to the Prince, whom his decree had declared entitled to inherit it (*o*): And Baliol was peaceably admitted into full poſ- Nov. 30, 1292.
ſeſſion of his dominions (*p*). His ſpirit, however, or his embecillity, having ſoon kindled a war between the nations, Edward in a few years over-

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(*m*) Rymer, II. 587. 588. 589.
(*n*) Rymer, II. 529. 531. 554.
(*o*) Rymer, II. 590. 591. 600. 601. 602.
(*p*) Fordun, l. 11. c. 14.

ran the North; and John, who, in reſentment of inſults offered him by that monarch, had renounced the fealty ſworn by him to England, and, in compliance perhaps with the wiſhes of his people, had again thrown them into the blundering alliance which from very remote ages his nation had conſtantly maintained with the French, was at laſt driven from the throne, or obliged ignominiouſly to abdicate his ſceptre (*q*.) It was during this critical ſeaſon, when his deſerted country was ſubjected to a foreign yoke, and the Engliſh government, from the rigour and the rapacity of the officers who adminiſtered it, had become univerſally odious, that Sir William Wallace (*r*), the patriotic and renowned Regent of Scotland, atchieved thoſe magnificent exploits, whoſe heroic glory has thrown a mighty luſtre around his name, and which cauſe his memory ſtill to be adored with an undiminiſhed and a fond admiration among the Scots. After the battle of Falkirk, the Knight of Ellerſly is affirmed by Blair, his conſtant attendant in arms, and by all the Scotch hiſtorians of any credit, to have held with young Bruce, acroſs the waters of the Car-

1296.

(*q*) Fordun, l. 11. c. 15. 26.

(*r*) Fordun, l. 11. c. 28. — Boet, l. 14. p. 305.—Major, l. 4. c. 14.—Buchanan, l. 8. c. 18.—Leſlie, VI.—Ridpath, p. 203.

Carron, a conference, which forms one of the moſt beautiful paſſages in the whole hiſtory of Scotland; and his diſcourſe, conveying ſentiments well adapted to catch a mind full of ambition and inclined to patriotiſm, is reported to have contributed greatly towards determining that noble youth to ſeize the favourable opportunity, afforded him by the abdication and the puſillanimity of Baliol, of finally abandoning the intereſt of England, and of aſſerting his own pretenſions to the crown (*f*). After a long and diſtracted interregnum, and a great variety of fortune, the Earl of Carrick was at laſt placed on the Scotch throne (*s*). But his poſſeſſion, violating the rules of ſucceſſion that from cuſtom had acquired an appearance of ſolidity, was not undiſturbed. Hereditary lineage, which, in all competitions between any individuals whoſe pretenſions are nearly equal in other reſpects, has great influence both in directing the imagination and in determining the affections of mankind, beſtowed a preferable right on another family: Edward I. had effected an entire conqueſt of all Scot- 1306

(*f*) Relationes, Arn. Blair. — Life of Wallace, XI. 4.— Fordun, l. 11. c. 34. — Boet. l. 14. p. 307. — Major, l. 4. c. 14.—Buchanan, l. 8. c. 23.—Leſlie, VI. — Rymer, II. 718.

(*s*) Fordun, l. 12. c. 9.

Scotland: Mighty efforts were made by them, by ſecret conſpiracies and by open force, to recover for themſelves, and to deprive him of, that kingdom: And the natural partiality diſcovered towards each other by Baliol and by the Engliſh, whom ſimilitude of paſſions, and an union of intereſts, impelled to look with enmity on a man who with-held from both the immediate object of their deſires, ſerved conſiderably to confirm his ſubjects in their attachment to Bruce. Beſides ſupporting his cauſe with arms in the field, the community of Scotland addreſſed to the
1320. Pope an earneſt ſupplication in his favour. In this letter (*t*), no leſs admirable for the expreſſive energy of its ſtyle, than the brave ſpirit diſplayed in it, they remind his Holineſs of the remote origin and high antiquity of the Scotch nation: Boaſt that, after having paſſed from the Greater Scythia, by the Tyrrhenian Sea and the Pillars of Hercules, into Spain, and after having ſojourned many ages among the fierceſt barbarians of that region, they had at laſt, a thouſand and two hundred years after the tranſit of the Iſraelites, acquired in the fartheſt extremity of the weſt a ſeat in the land ſtill occupied by them: Celebrate the peculiar and early favour manifeſted

(*t*) Fordun, l. 13. c. 2. 3.—Crawfurd's Officers of State, Appendix, N° 5.—Anderſon's Diplomata, N° 51. 52.

ed towards them, by Jeſus Chriſt, in vouchſafing to eſtabliſh them in his holy faith, by his firſt Apoſtle, Andrew, brother-german of St Peter: Affirm, that they had already been governed by one hundred and thirteen Kings (*u*), all ſprung in an uninterrupted line from the Royal blood of their native princes: Mention the independence which they had hitherto enjoyed from the dominion of foreigners: Deſcribe the treacherous invaſion and the cruel deſolation made on their abodes by the Engliſh arms: Take notice, that, by unanimous conſent, they had choſen for their Sovereign their deliverer, Robert Bruce, who, after many perils and much toil, had reſcued his forſaken country from the extreme miſery brought upon it by the iron hand and deſolating ſword of Edward: Aſſert, that they fight not for riches, for honour, or for glory, but only for liberty; a poſſeſſion with which, they believe, no good man ever parts but with life, and which they declare it to be their fixed purpoſe, as long as a hundred of them ſhould remain alive, to maintain inviolate both againſt him and againſt England: Beſeech the Holy Father, by an immediate interpoſition of his apoſtolical authority, to admoniſh Edward, that, contented with thoſe ample dominions

(*u*) Parl. 1661. c. 5. — Parl. 1685. c. 2. — Fordun, l. 5. c. 60. l. 10. c. 2.

minions which, in former times, had been deemed sufficient for more than seven Kings, he would suffer the Scots to dwell in peace in that miserable corner beyond which, they say, no habitations are found: And conclude with intimating, that if his Holiness, lending a credulous ear to the reports of their enemies, should not interpose in their behalf, but persist in favouring the English, the laceration of bodies, the loss of lives, the perdition of souls, and all the other calamities which might ensue from a continuance of the rupture between the two nations, would assuredly be imputed to him by the Most High.

This remonstrance was not entirely destitute of success. An expostulatory mandate (*x*), full of just sentiments on war, was soon issued to the English monarch by John XXII. who at that time governed the Church of Rome, and Robert
1329. Bruce died in full possession of the Scotch crown. But the expelled family was no sooner delivered from the awe in which they had been kept by the vigour and the intrepidity of his mind, than fresh attempts were begun by them to recover that throne to which lineal descent from its ancient possessors gave them a hereditary claim; and Edward Baliol (*y*), after having surprised,

2 and,

(*x*) Rymer, III. 846.

(*y*) Rymer, IV. 536.—Fordun, l. 13. c. 20. &c.

and, in a great battle fought at Duplin, put to rout the Earl of Marre, on whom, during the minority of David II. the regency had been conferred by the ſtates of the kingdom, was at laſt crowned at Scoon, a ſmall village at which that magnificent ceremony had uſually been performed. During the ſhort time the Scotch ſceptre remained in his hands, this prince neglected not to employ his regal power, both in beſtowing rewards on thoſe who had ſupported his pretenſions to it, and in inflicting proſcription on ſuch as had oppoſed them. Maliſe Earl of Strathern had not only addreſſed the Roman Pontiff in behalf of Bruce, but reſiſted the forces of Edward; and, on the reſtoration, having been forfeited for his treaſons, loſt both the dignity and the eſtate of Strathern. That Earldom was granted by the King to John de Warrenne, Earl of Surrey, who had aſſiſted in reſtoring him, and who was thenceforth ſtyled Earl of Strathern, as well as of Surrey (z). 1332. Strathern.

This acquiſition was not long retained by Warrenne. The meaſures to which Baliol, in conſequence of the engagements contracted by him, was obliged to condeſcend, particularly in ceding a large part of his dominions, and in ſurrendering the feudal ſovereignty of the remain-

O der

(z) Rymer, II. 726. IV. 595. 616.—Dugdale, I. 80. 81.

der to the King of England, were no leſs unpopular and mean, than the memory of Robert was dear and reſpected, in Scotland. David, after having been neceſſitated to retire for ſafety to France, at laſt recovered entire poſſeſſion of his father's kingdom; and in 1343 beſtowed the Earldom of Strathern, which had again been forfeited, on Sir Maurice Murray, nephew and heir of Maliſe, who was then dead, and on the heirs-male of his body, in their default to return to the Crown (*a*).

Maurice Murray Earl of Strathern was killed in 1346 at the battle of Durham; and not having left iſſue, the Earldom, in terms of the grant made in his favour, returned by ſucceſſion to the King. The honour was thereby extinguiſhed, till David II. gave the eſtate to his nephew Robert, the Steward of Scotland, by whom the title was accordingly borne. In authentic deeds ſtill extant, granted both by himſelf and by others, the Steward is termed Earl of Strathern (*b*).

This prince, the firſt of the Houſe of Stewart who aſcended the Scotch throne, granted the Earldom of Strathern, which by his acceſſion had merged

(*a*) Dalrymple's Collections, p. 376. 377.—Charter cited in Ad. Caſe, ch. 5. p. 55.

(*b*) Dalrymple's Collections, p. 376.——Fordun, l. 14. c. 27. 42.—Hawthornden, p. 45.

merged in the Crown, to his ſon David Stewart. In conſequence, the dignity, as well as the eſtate, paſſed to David (*c*); and it is atteſted, by all hiſtory, that both were tranſmitted by him to his daughter Eupheme, Counteſs Palatine of Strathern. Sir Patrick Graham, her huſband, was alſo dignified, on his marriage, with a correſponding title (*d*). Their ſon Maliſe Graham (*e*), during his captivity, was diveſted of the Earldom by James I. (*f*), who, inſtead of it, conferred on him the Earldom of Menteith. In conſequence, Maliſe ceaſed to be Earl of Strathern, and was ſtyled Earl of Menteith; a title which continued long in his family. The Earldom of Strathern, in 1427, was granted by James to his uncle Walter Stewart Earl of Athole (*g*); and the honours were borne by Walter alſo. On his forfeiture (*h*) the Earldom returned to the Crown, and the dignity was

(*c*) Mackenzie's Cond. p. 14.—Lovat's Anſwers, p. 25.—Fordun, l. 14. c. 39. 56.—Buchanan, l. 10. c. 46.—Hawthornden, p. 34.—Rymer, VII. 1. 345.

(*d*) Mackenzie's Cat. p. 12. Cond. p. 14. and Inform. p. 12. 18.—Lovat's Anſwers, p. 25. and Remarks, p. 10.—Rymer, VIII. 544.—Fordun, l. 15. c. 25.

(*e*) Rymer, X. 307. 309.

(*f*) Buchanan, l. 10. 46. 48.—Hawthornden, p. 34.

(*g*) Royal Charter, B. 3. N° 48.—Sup. Caſe, p. 20.—Ad. Caſe, ch. 5. p. 54.—Brief, p. 106.

(*h*) P. 143. above.

extinguiſhed. Athole was afterwards revived in the perſon of John Stewart, on whom his brother James II. beſtowed that eſtate.

Crichton. The wife of Lord Crichton, a grandſon of the Chancellor, was a lady of exquiſite beauty; and James III. regardleſs of her high quality, made a full uſe of the advantage afforded by his elevated ſtation, to obtain a triumph over her virtue. Crichton was little diſpoſed to digeſt, with tameneſs, a groſs injury inflicted in a ſenſible part, in which a proud temper or a tender heart may be both ſeverely and eaſily wounded; and his enraged ſpirit emboldened him to avail himſelf of recommendations which enabled him to make repriſals on a favourite relation of his Sovereign. The King, by a marriage, endeavoured to cover the diſhonour of his beloved ſiſter; but, amidſt all his diſſimulation, could not forget the indignity which, in her perſon, had been done to Majeſty; and, on pretence that Crichton had entered into a conſpiracy to place the Duke of Albany on the throne, he was afterwards tried, and at a long interval condemned by Parliament (*i*). His Lordſhip of Crichton was ſeized by the Crown: The Barony of Frendraught, which belonged to his wife,

(*i*) Buchanan, l. 12. c. 50. 51—Hawthornden, p. 139. 95. Parl. 1475. c. 79.—Parl. 1483. c. 106.

wife, was all the eſtate that was reſerved to his ſon: The title became extinct.

The preceding inſtances illuſtrate our general principle, as well as the particular poſition advanced in this ſection: But proofs of both ſtill ſtronger, if poſſible, than the former, occur in the family of Marre (*k*). Alexander Stewart, that gallant adventurer who eſpouſed Iſabella Douglas Counteſs of Marre (*l*), incapable of reliſhing the languid pleaſures of tranquillity, immediately after peace had been reſtored to his country by the victory of Harlaw, conducted a choſen band of auxiliary troops to ſhare in the toils and the glory of a war then waging in the Netherlands; and having on that expedition wedded Jacqueline only child of the Earl of Holland, his lofty ambition, aſpiring at the ſovereignty of thoſe Provinces, ſtimulated him to aſſert his claim, or rather to gratify his reſentment, in a predonious war on that element on which, even in thoſe days, the Hollanders were vulnerable (*m*). A man, ſo haughty or ſo turbulent, would not readily be contented with a right, determinable or precarious, which, under ſettlements made by Iſabella, he had to poſſeſs the Marre.

(*k*) P. 155. above. (*l*) See p. 179. above.

(*m*) Fordun, l. 15. c. 19. l. 16. c. 25.—Boet. l. 17. p. 365.—Major, l. 6. c. 13.—Buchanan, l. 10. c. 43. 44.

Earldom for life. The eſtate had once been ſettled on his heirs (*n*), as well as on himſelf; but this ſettlement ſeems afterwards to have been altered with his own conſent (*o*); yet holding himſelf ſtill to retain the property, he took upon him to ſurrender the fief to the King; and on his own reſignation, got from James I. a charter, deviſing it, after his death, to his natural ſon Sir Thomas Stewart, and the heirs-male of Sir Thomas's body, in their default to return to the Crown (*p*). In 1438, after the death both of Alexander and of Thomas without iſſue, Robert Erſkine Lord Erſkine was found, by an inqueſt, lawful heir of Iſabella, the laſt owner, by whoſe will the Earldom ſtood ultimately deviſed to her own heirs; and having obtained inveſtiture in the eſtate, bore the title for ſome years. But, on pretext of the reverſion which, in default of heirs of the body of Thomas Stewart, had been ſtipulated to the Crown in the charter of James I. and of the baſtardy both of Alexander and of Thomas, the lands was ſeized by James II. (*q*). In 1457, Lord

(*n*) Charter, 12th Auguſt 1404, B. 7. N° 257.

(*o*) Inſtrument, 19th September 1404.—Charter, 9th December 1404.—Charter, 21ſt January 1404-5.

(*p*) Charter, 28th May 1426. B. 2. N° 8.

(*q*) Fordun, l. 16. c. 25.—Boet. l. 17. p. 366.—Major, l. 6. c. 13.—Buchanan, l. 10. c. 44.—Hawthornden, p. 34.

Lord Erſkine's right was ſet aſide on an action at law, and an aſſize of error, held in preſence of the Sovereign, who ſtooped to attending them in perſon, found that the Earldom had devolved to the King. In conſequence, Lord Erſkine and his family, the rightful heirs, being excluded from the property, did not carry the honours (*r*); and the Earldom was beſtowed on Lord John Stewart, a ſon of James II. who bore the title annexed to it. Againſt this Prince, amidſt his innocent amuſements and the gentleſt manners, fearful ſuſpicions were artfully inſtilled, by cunning men, into the feeble mind of James III.; and John Earl of Marre, having been inſidiouſly invited to Edinburgh, was ſoon after murdered, perhaps without the direct participation of his royal brother (*s*). The noble eſtate was then granted by James to his favourite maſon, and Robert Cochrane became Earl of Marre. Buchanan's expreſſions here are remarkable. 'The King,' ſays he, 'after the death of his brother, either granted that country in property to Cochrane, or gave it to be managed by him; and the high

(*r*) Keith, p. 216. 222. 226. 297. 305. 520. 525.

(*s*) Auctarium Scotichron. 1452.—Major, l. 6. c. 18.—Buchanan, l. 12. c. 17. 38.—Leſlie, VIII. in 1460 and 1479.—Pitſcottie, p. 135. 136. 137.—Hawthornden, p. 101. 125.—Parl. 1466. c. 2.

'dignity of Earl of Marre was a principal source 'of the great envy which arose on his eleva-'tion (*t*).' Cochrane's fate is well known. After his murther the Earldom was probably conferred on Lord John Stewart, a younger son of James III. by whom also the honours were possessed (*u*); and, after his death, seems to have remained with the Crown till, in 1562, it was bestowed by Queen Mary on her brother the Prior of St Andrews (*x*). Lord James Stewart, who was thence styled Earl of Marre (*y*), a powerful as well as able man, might, perhaps, have retained both the estate and the dignity, as the long possession which had then been held by the Crown, under a title seemingly inexceptionable, must have given a great firmness to its apparent right. But the integrity of his morals is not less conspicuous than the solidity of his understanding and the strength

(*t*) Cocherano maxime invidiosus fuit titulus comitatus Marriae; quam regionem Rex, extincto minore fratre, vel ei donaverat, vel regendam commiserat. Buchanan, l. 12. c. 46.—Hawthornden's expressions are equally remarkable: "Robert Cochrane," says he, "who, of a surveyor of "works, was made Earl of Marre, or, as some mitigate "that title, intromitter with and taker up of the rents of "that Earldom," p. 131. &c.

(*u*) Hawthornden, p. 157.—Stewart's History of the Stewarts, p. 79.—Crawfurd, p. 31.—Parl. 1489. c. 25.

(*x*) P. 143. above. (*y*) Keith, 215. 216. 222. 224. 226.

ſtrength of his parts; and on the death of Alexander Stewart, the Earldom ought to have deſcended to the family of Erſkine, the heirs general of Iſabella. In 1555, after a deſperate ſtruggle, their right had been again eſtabliſhed by the verdict of a jury, and James, probably moved by the near relation in which his mother ſtood to that family (*z*), as well as diſdaining to hold an eſtate which in juſtice belonged to another, ſurrendered the Earldom to the Queen, by whom a charter was executed, granting it to John Erſkine Lord Erſkine. The Prior was no ſooner diveſted of the lands than he ceaſed (*a*) to carry the honours of Marre. This title went to Lord Erſkine; but not till, in June 1565, the Earldom had been formally made over to him (*b*). This nobleman, however, was not created Earl of Marre: He got no more than the dignified fief; but the dignity, an appendant of it, was in conſequence veſted in his perſon, and continued in his family, till John, the laſt Earl, was attainted of treaſon for acceſſion to the rebellion raiſed by him

(*z*) His mother Margaret Erſkine was a ſiſter of Lord Erſkine. Crawfurd's Hiſtory, p. 37.

(*a*) Keith, 226. 520. 525.

(*b*) Keith, 277. 283. 288. 297. 305. 309. 379. 520. 525. —Appendix, 106. 107. 108. 109. 110.—Parl. 1563. c. 1. —Parl. 1567. c. 1.

him in 1715 (*c*). Hence, perhaps, it was that the Erſkines, Earls of Marre, enjoyed not the precedency correſponding to the high antiquity of the dignity which had devolved to them.

Lennox. The Earldom of Lennox, on the death of the Regent, went by inheritance to his grandſon James VI. and, in 1572, was granted by him during his minority to his uncle Charles Stewart, his heirs and aſſigns; on whoſe death it deſcended not to his only child Arabella Stewart, the Lady whom Sir Walter Raleigh was unjuſtly condemned on an uneſtabliſhed charge for having conſpired to place on the throne, but was revoked by the Crown, and conferred, firſt, on the King's grand-uncle Robert Biſhop of Caithneſs, then on his couſin Eſme Lord d'Aubigné, who enjoyed both the dignity and the eſtate of Earl of Lennox till they were advanced, in 1581, to a Dukedom (*d*).

(*c*) Mackenzie's Cat. p. 8.; and his Cond. p. 11.—Lovat's Anſwers, p. 16.—Sup. Caſe, p. 31.—Add. Caſe, ch. 5. p. 42. (*d*) Lovat's Ad. Cond. p. 20.

SECT.

SECT. IX.

Were diſpoſable by Will.

HONOURS, annexed to lands, and transferable with them by ſale, could not be entailed fiefs, unalterably limited to a determinate ſeries of heirs, each indefeaſably entitled, in courſe of ſucceſſion, to inherit them, but muſt have been fees ſimple, and were, in all probability, deviſable by will; a propoſition, indeed, which amounts to no more than aſſerting that a proprietor might make a ſettlement of his eſtate, as noble fiefs were not, leſs than other lands, diſpoſable in that manner.

Caithneſs.

William Sinclair, Earl of Caithneſs, and Chancellor of Scotland, was twice married. His firſt wife was Margaret Douglas, a daughter of that mighty warrior Archibald the fourth Earl of Douglas (*e*). By this Lady he had a ſon William, whoſe heir Henry Lord Sinclair, in conſequence of

(*e*) The Earl of Douglas, who, after, for important ſervices rendered to Charles VII. he had been created Duke of Touraine and Mariſchal of France, was killed at the battle of Verneuil.

of the primogeniture of his father, was declared by Parliament, in an act (*f*) remarkable for that singular interposition, to be chief of his blood. His second wife Marjory Sutherland, a daughter of Alexander Sutherland of Dunbeath, bore him at least two sons. Oliver, besides other valuable estates, having got from his father the barony of Roslyn, built there the romantic castle that has afforded matter for one of those songs, which, on account of the plaintive melody of their music, and of the rare simplicity of their sentiments, are greatly admired in Scotland. Out of partiality to her other son, also named William, the Earldom was settled on him by his father, who, having resigned it to the Crown, took a new charter in favour of William and his heirs general (*g*). William, either the third or the second son of his father, was not created Earl of Caithness by any patent; yet the dignity, as well as the estate, was enjoyed by him under that settlement, which is no more than a common conveyance of the lands: The title is not even mentioned in it: And both descended to his heirs. George, his grandson, purposing that they should be limited to males, altered

(*f*) Records of Parl. 26th January 1488-9. B. 4. p. 113. —Crawfurd's Officers of State, p. 36.

(*g*) Charter, 7th December 1476; (B. 7. N° 393.) print-in Appendix to the Case of the Earl of Caithness.

altered the deſtination under which they had hitherto ſtood deviſed, and on a deed executed by himſelf, reſigned the Earldom into the hands of James V. In conſequence, a new grant was made to John Sinclair (George's preſumptive heir), and the heirs-male of his body, by whom both honours and lands were accordingly inherited (*b*).

Lady Jane Beaufort, a great-grandaughter of Edward III. (*i*), was peculiarly diſtinguiſhed by that refined ſenſibility, which rendering the heart eaſily ſuſceptible of the tender paſſion, cauſes all other enjoyments, compared with its elegant delights, to ſeem faint and empty. Diſconſolate, after the aſſaſſination of James I. for the loſs of a huſband to whom vanity increaſed her attachment, and overpowered by that reſtleſs melancholy whoſe violence, exhauſting itſelf, finds relief from preſent ſorrow in objects ſimilar to thoſe over which, lately bereaved of them, imagition is always pleaſed to brood, the Queen was not aſhamed to degrade her high rank, by marrying Sir James Stewart, a man much inferior to her in degree, of whom ſhe was paſſionately fond (*k*); and during the time her affection laſted, beſides other children, ſhe bore to the Black Buchan.

(*b*) Ad. Caſe, ch. 6. p. 110.——Crawfurd's Officers of State, p. 34.—Caſe of Caithneſs above.

(*i*) Fordun, l. 16. c. 2. (*k*) Major, l. 6. c. 15.

Knight of Lorn, a ſon named James Stewart, on whom his nephew James III. beſtowed the Earldom of Buchan. In a royal charter (*l*), the Earldom was limited to James and the heirs male of his body, in their default to return to the Crown; and under this limitation, by which the fief was rendered maſculine, it deſcended to his grandſon John Stewart, the third Earl of that race, who, purpoſing to alter the deſtination, executed a ſettlement, deviſing the Earldom to himſelf for life, and to his ſon John, and the heirs general of his body, in fee. On this deed the Earldom was ſurrendered to the Crown; and, on the reſignation, a new charter was obtained, in 1547, limiting the deſcent in the terms appointed by the Earl. In a few days, John the ſon was killed at the battle of Pinky, in the lifetime of his father, before he had been infeoffed under the charter; upon which his only child Chriſtian Stewart was regularly returned, on an inquiſition, to be his heir, and a royal precept was iſſued for giving her ſeiſin upon it. This Lady, in the character of fiar of the Earldom of Buchan, granted charters, renewing their inveſtitures, to vaſſals who held their lands of the family: And, on her grandfather's death, obtaining full poſſeſſion of the dignity as well as of the eſtate, ſhe was univerſally

(*l*) Granted about 1476.

verſally ſtyled Counteſs of Buchan. The heirs-male, deſcended of her grandfather and of the original grantee, never made any pretenſions to either (*m*).

James, the third Earl of Morton, had no male iſſue: But he had three daughters; firſt, Margaret, who married the Duke of Chatelherault, Regent of Scotland, and heir to the Crown, during the minority of Queen Mary; ſecond, Beatrix, who married Robert Lord Maxwell; third, Eliſabeth, who married James Douglas, ſecond ſon of George Douglas, a brother of Archibald Earl of Angus. In that ſituation, his Lordſhip made a deed, by which his eſtate was deviſed to his youngeſt daughter Eliſabeth, and her huſband James Douglas, and the heirs-male of their bodies. Under this ſettlement, on which a charter was taken from the Queen, James Douglas, on the Earl's death, ſucceeded to the title as well as to the Earldom of Morton. He is that Morton who was Regent during the minority of James VI. and who makes a conſiderable figure in all the tranſactions of thoſe days. The conveyance executed by his anceſtor the third Earl, inſtead of being impeached by either of the elder daughters, Morton.

(*m*) P. 180. 184. above. —— Lovat's Anſwers to Mackenzie's Cond. p. 8.—Ad. Caſe, ch. 5. p. 60.

daughters, was ratified both by the Duke, by the Ducheſs, and by their eldeſt ſon (*n*).

In many caſes, in which noble fiefs, in default of the heirs ſpecified in the grants of them, had been provided to return to the Crown, the limitations did not take effect, and the dignities, as well as the eſtates, were prevented from devolving to Majeſty, or from becoming extinct, even on the failure of the heirs to whom they had originally been limited. A deviſe, made in favour of the King, is equally effectual; but it is alſo alterable, as much as a ſettlement executed in favour of a ſubject (*o*).

SECT. X.

Difficulties explained.

MEN, who, contented with a ſuperficial view of ancient objects, have not obtained an exact idea of the eſſential differences by which Scotch

(*n*) Stewart's Hiſtory of the Stewarts, p. 84.——Crawfurd's hiſtory of them, p. 33.—Ad. Caſe, ch. 4. p. 46.—Crawfurd's Officers of State, p. 94.—See note (I) at the end of the volume.

(*o*) See p. 222. below.

Scotch Peerages were ſucceſſively diſcriminated from themſelves in different ages, not being delivered from the confounding impreſſion excited by their preſent appearance, will be ſurpriſed, perhaps alarmed, to hear, that noble dignities were of old deviſable by private perſons; and we find a total ſcepticiſm ſometimes entertained, and ſeemingly ſanctified by authority, about the operation of thoſe ſettlements. But the Scotch records muſt be wholly obliterated before the connection, which in former times ſubſiſted between fiefs and honours, can reaſonably be denied: And your Lordſhip's accuracy will attentively mark both the nature of the things which are here aſſerted to have been deviſable, and the limitations which qualify my aſſertion concerning them. Ground, a ſubſtance immediately productive of fruits, of wealth, and of independence, was much more valuable than empty titles: Even juriſdictions, which give power and importance and influence, were poſſeſſions more ſolid: But their owners were allowed to diſpoſe of both the former, and of courſe could hardly be diſabled to make ſettlements of the latter.

Territorial honours, it has been obſerved, were merely names beſtowed on lands, to which analogous appellations were aſſumed by the proprietors, in order to expreſs, in clear characters, that

they were owners of eſtates raiſed to the degrees belonging to them. Private men, therefore, at executing ſettlements, or at making conveyances, neither conferred Peerages, nor pretended to that lofty prerogative: They aſpired not even at diſpoſing of honours, conſidered abſtractedly by themſelves, or taken ſeparately from lands: They did no more than diſpoſe of grounds, which had been deemed ſufficient for ſuſtaining the rank of Nobility, and which were poſſeſſed of the denomination aſſigned to them by the Crown.

To theſe their dignities, no leſs than their juriſdictions, were annexed, and proprietors could not but poſſeſs a power over the honours united to their lands, as well as over any other appendants of them. A man, whoſe intereſt in a thing is not limited, is entitled to diſpoſe of every component part of his property.

In this article one ſpecies of eſtate was not diſtinguiſhed from any other. A man was unqueſtionably entitled both to ſettle and to alienate lands erected into a Lordſhip, an Earldom, a Marquiſate, and a Dukedom. No diſability was impoſed by the rank to which his property was elevated; and in old times baronies, and even ſimple freeholds, conferred, no leſs than eſtates raiſed to higher orders, ineleƈtive feats in parliament.

Feu-

Feudal honours could not be granted by any other than the Sovereign. A parcel of lands could be erected into a barony only by the King; and fiefs, held immediately of the Crown, were alone susceptible of that elevation. Even Royalty cannot exert power over things which belong not to itself. Those holden of subjects could not be nobilitated: and territorial dignities were not transmissible, either by the original grantees or by their heirs, by subaltern conveyances even of the whole dignified estate to subordinate vassals. An integral alienation, by which the owner was totally divested, at least of the superiority, in favour of a new Lord holding immediately of his Majesty, was alone capable of producing that effect (*p*).

The King, the sole arbiter as well as alone fountain of honour, it must be supposed, would not in ancient times confer nobility on estates, more than at present Peerages are granted to persons, improper to be ennobled; and as the dignity was annexed to the fief, and of course a conveyance of the lands with which it was incorporated could alone effect an alteration on the destination of the title, if a person, different from the

(*p*) Erskine, B. 2. t. 3. § 46. — Stair, B. 2. t. 3. § 45. —Macdouall, B. 2. t. 3. § 86. — Craig, L. 1. d. 10. § 16. 21.; l. 1. d. 12. § 16. 26.

lineal heir, acquired either by purchaſe or by ſettlement a right to the honours, this acquiſition of a thing, which formed part of the whole purchaſed by him, could not but be entirely agreeable to the royal intention, declared by having ſelected the lands for the immediate object of regal favour.

In Scotland, in which the feudal ſyſtem was long cheriſhed in all its rigour, moſt of the lands belonging to tenants of the Crown were held by military tenure. Other tenures were indeed attempted to be brought into faſhion; but, in a country, in which mercenary legions were ſcarcely known or ſeldom employed, thoſe endeavours were neither early nor effectual. In ancient days, regular troops were not kept on foot there: Private men, expoſed to attacks, and ſtudious of ſafety, were unwilling to part with obligations, which afforded them a tolerable ſecurity againſt unlawful invaſions of their perſons or of their property: And the feudal militia continued long to be the only military force, for which a proviſion was eſtabliſhed by law, or which the Sovereign could bring into the field. Lands, not proved to be enjoyed on other terms, were preſumed, even in 1746, to be held in that manner; and it might be authenticated by record, that in the fifteenth century moſt of the great eſtates in Scot-

Scotland remained military fiefs. The ſervice for which theſe fiefs were granted, demanded, that the benefice or pay, which was given to the feudatary for performing it, and by which he was enabled to diſcharge his duty, ſhould not paſs from him (*q*). Hence a vaſſal, on alienating even a half of his lands without the conſent of his Lord, forfeited them to the ſuperior of whom they were held (*r*). This condition, implied in military tenure, was a reſtriction abundantly ſevere on the diſpoſal of property, but conſidered in relation to the preſent buſineſs, probably will not appear an impolitic regulation. The crown, being thereby poſſeſſed of a check equivalent to a negative on alienation, might prevent both titles and eſtates from going to perſons unfit to be ennobled; and poſſeſſions, adequate to maintain honours, were ſecured to thoſe who ſhould enjoy them (*s*).

Even in caſes, in which lands were held by a tenure different from ward, vaſſals were frequently reſtrained, by obligations purpoſely contracted to diſable them, from alienating their fiefs without the conſent of their Lords.

(*q*) St. Will. c. 31.

(*r*) Craig, L. 3. d. 3. § 8. 13.—Mackenzie, B. 2. t. 5.—Stair, B. 2. t. 11. § 10. 17.—Macdouall, B. 2. t. 11. § 31.—Erſkine, B. 2. t. 5. § 10. 14.—Parl. 1587. c. 113.

(*s*) Parl. 1640. c. 20.—Parl. 1704. c. 3.—6to Annæ, c. 1.

Feudal property was alſo limited by another reſtriction, which extended to every ſpecies of tenure; to wit, that a ſuperior was not bound to accept for his vaſſal, or to grant inveſtiture to any other than the heir called by deſcent to inherit the fief in courſe of the deſtination made in the original grant beſtowing it (*t*). The King, indeed, the Liege Lord of all his people, who, in matters of juſtice, ought never to ſhew a partiality to any of them, ſeldom availed himſelf of the right of rejection that was veſted in him. The faculty however might be exerted by the Crown as well as by other ſuperiors; and in ancient times many titles became extinct, becauſe the noble fiefs, to which they were united, had devolved to the Sovereign on the failure of the particular line of ſucceſſors to whom they had originally been limited (*u*).

Thoſe, therefore, who are anxious about preſerving the purity of the peerage, need not be alarmed at finding a power, ſeemingly no leſs anomalous in itſelf, than adverſe to the ideas rightly entertained at preſent, aſſerted to have once

(*t*) Stair, B. 2. t. 3. § 5. 43.—— Macdouall, B. 2. t. 4. § 11.: B. 3. t. 10. § 12. 14. 15.— Erſkine, B. 2. t. 7. § 5. 6.—Craig, L. 2. d. 4. § 17.: d. 6. § 25.: L. 3. d. 1. § 13. 14.—Parl. 1469. c 44.—Parl. 1587. c. 113.—20mo G. II. c. 50.

(*u*) P. 188. 216. above.

once been lodged in ſubjects. The accumulated circumſtances, which have been mentioned, eſtabliſh, that honours were anciently annexed to lands; and that the former, inherent in the latter, were transferable, as well as deſcendible, with them: But they ſerve alſo to prove, that in ancient times ſeats in parliament depended not on nobility, but on freeholds; and that before 1587 the dignities conferred on fiefs, and aſſumed from them, were merely titles, which implied degree and precedency or place only: And the various reſtraints, impoſed by the feudal law on alienation, were ſufficient to prevent either honorary appellations or noble fiefs from going to perſons, different from the heirs called by blood to inherit them, without the approbation and conſent and even intervention of the Crown.

BOOK II.

PERSONAL HONOURS.

IN corrupt times, in which government either poſſeſſes not the good ſenſe to adopt patriotic plans, or, from the pride and the meanneſs of thoſe who adminiſter it, is obſtinately determined to purſue pernicious meaſures, a baſe proſtitution of parts, artfully diſguiſed under occaſional profeſſions of diſintereſted principles; a dexterous ſervility of ſpirit, cunningly attempered with an impoſing affectation of an ungovernable boldneſs; even a frivolous talkativeneſs, duly reſtrained by conſtant habits of an obſequious politeneſs; conduct to preferment, much oftener than a worthy exertion of talents, real greatneſs of mind, or ſubſtantial qualities. A man, however, in remounting to the remote cauſes of things,

things, may be allowed, without being charged with entire ignorance of the world, to ſuppoſe that perſonal honours owed their firſt origin to perſonal excellencies. Superior merit, being ſomething vaſt and uncommon and luminous, compels notice, and muſt be reſpected in every region; but from the different ſtates in which mankind are placed in different climates, and from the remarkable diverſities put by nature, or produced by education, among the faculties and the inclinations of individuals, preſents itſelf alſo under a great variety of different aſpects.

One ſpecies of excellency, more ancient and more univerſal, as well as more ſhowy and more commanding, perhaps than any other, is that diſplayed in thoſe bloody conflicts termed wars, which unruly paſſions, ſupreme folly, or diſorder of fancy, ſeem much more frequently than lawful defence, rational views, or juſtneſs of underſtanding, to have excited in all ages, both between enlightened and between ignorant nations. Hardy feats of arms, in a brave contempt of death, indicating a mighty elevation of ſoul, throw, by their rare brilliancy, an effulgent glory around thoſe magnanimous ſpirits who perform them; and a dazzling reputation atchieved by martial deeds, which in perilous times are more immediately conducive, than moſt other actions,

actions, to common weal, can ſcarcely be ſuppoſed, among any fighting people, however uncivilized, not to come early to be ſignalized by pompous and obſervable enſigns. Among the Romans, extraordinary valour was rewarded with arms, with banners, and even with coronets; and generals who had gained victories, rendered uncommonly ſplendid by great carnage, were ſometimes ſaluted by their ſoldiers with the flattering title of Emperor (*x*). In a nation almoſt conſtantly engaged, like Scotland, either in domeſtic broils within itſelf, or in public conteſts with foreign enemies, gallant exploits performed in the field muſt ſoon have commanded ſimilar expreſſions of popular admiration. Accordingly, in old records, we read of many valiant men; Graham, Randolf, Murray, Douglas; diſtinguiſhed by the appellation of Knight, which probably had been beſtowed upon them without much formality by their companions in arms, or perhaps had been preſumptuouſly aſſumed by themſelves without even that ceremony.

It is agreeable to a natural congruity, that the right to honours, granted out of reſpect for qualities which are perſonal, be confined to the individuals whoſe ſuperiority is propoſed to be marked

(*x*) Tacit. Annal. iii. 74.—Velleius Paterculus, ii.—Cic. l. 10. epiſt. 8. ad Att. l. 10. epiſt. 24. 34. ad fam.

ed by them. As heroic courage is not an inheritable virtue, Knighthood, an order originally martial, was never united to lands, and does not yet pafs to heirs; and the only diftinctions, entitled to be denominated perfonal honours, which appear to have been anciently known or valued in Scotland, feem to be military.

But the rank held by a father, from the propinquity of their relation, from the frequency of their contiguity, and from their participation of his fortune, always communicates itfelf in fome degree to his children: People defcend not without reluctance from that which has once been fuftained by them: And parents are generally folicitous, that advantages enjoyed by themfelves be fhared by their pofterity. Hence honours could not long continue to refemble in tranfitorinefs the qualities which had firft given them exiftence. Men, confcious of defert, or fwollen with vanity, would infift that their families, as well as themfelves, fhould be aggrandized.

SECT.

SECT. I.

In Countries, governed, like Scotland, by the Feudal Law, Nobility deſcendible to Heirs would not ſoon be diſannexed from Fiefs.

OPULENCE, which ſignifies a power of acquiring things grateful to ſenſe, and to paſſion, exciting a preſent conception of theſe objects and of the pleaſures derivable from them, diffuſes an aſſured complacency over the ſpirits of thoſe bleſſed with it: And external advantages, which, on directing our eyes towards ſuch as are diſabled by poverty to command like grandeur or conveniencies, we behold ourſelves to poſſeſs above them, preſenting to the mind a pleaſant image of our condition in life, are apt, in all caſes, to beget in our breaſts a ſatisfaction contemptuous of others, as well as vain of ſelf.

In populous, indeed in moſt regions, landed property, on account of the real comforts and ingenuous pleaſures connected with it, as well as its durableneſs and its ſolidity, is juſtly held in a ſuperior eſtimation among ſenſible people. The amount of fortunes which conſiſt in money and in

in moveables, expoſed to accidents and liable to periſh, can ſeldom be aſcertained with exactneſs. There even fair appearances are often deceitful; and a perfect reliance cannot always be had on their reality and firmneſs: But grounds and immoveables are ſolid and laſting poſſeſſions; and landed eſtates, viſible ſtriking durable objects, imply, more clearly than any other, a permanent ability of purchaſing enjoyments agreeable to nature and to vanity. Hence in every ſoil, in which land forms either the only valuable or the principal ſpecies of property, a conceit, arrogant as well as lofty, muſt be almoſt mechanically generated in its owners (*y*).

The importance, naturally belonging to land, may ſometimes be increaſed by circumſtances, and in particular may be affected by ſuch as tend either to diminiſh the number of thoſe poſſeſſed of it, or to augment the ſize of their eſtates. In nations, therefore, in which manufactures and agriculture are in a low, perhaps a depreſſed ſtate, an extraordinary dignity muſt be reflected upon it. Among them, affluence can rarely, if ever, be acquired in buſineſs; and the proprietors of ground, the only citizens who can be deemed rich men, by the great elevation to which they

(*y*) Treatiſe of Human Nature, V. 2. p. 1. ſ. 5. 9. 10.

they are exalted above every order around them, muſt be raiſed aloft almoſt out of the reach of compariſon or of envy.

The arrogance, inſpired by property, may be high in other countries; but muſt be heightened, in thoſe governed by the feudal law, to a degree peculiarly eminent. There, in conſequence of the rule, by which, in ſucceſſion, a preference is given to males above females, and inheritances are not ſuffered to be broken in pieces among them, the favourites, termed heirs, to whom fortunes are tranſmitted without toil, and even preſerved with anxiety by legiſlature, remarking the ſuperior ſituation in which they are placed above perſons, who, though equal in extraction, are yet kept in a humiliating diſparity beneath them, cannot eaſily avoid being ſtrongly impreſſed with a ſuperlative idea of their own importance.

A vanity is very generally found even in the acquaintance of perſons conſpicuous for wealth, for equipage, for dreſs, or for titles; and people, who can ſcarcely be termed ſilly, are ſometimes aſhamed to be ſeen in contact with any whoſe pockets are ſuſpected to be empty of money. It muſt, therefore, give us a ſenſible ſatisfaction, if our near relations, with whom we are commonly obliged to maintain a cloſe intercourſe, be elevated in the world; and our remote anceſtors, no

leſs

leſs than our immediate parents, are productive cauſes of that vain ſentiment. Wiſe men, conſcious of the ſuperior value of intrinſic merit, endeavour indeed, as much as poſſible, to repreſs in their breaſts ſuch fooliſh prejudices. Nevertheleſs, every one plumes himſelf more or leſs on the riches and the greatneſs of his forefathers; and the ſtrong prepoſſeſſion, almoſt univerſally entertained in favour of antiquity of deſcent, muſt be owned to be in ſome ſort a mechanical effect of the agreeable phantaſms (z) which give riſe to it.

An extended train of honourable perſonages, preſented to view in a regular ſucceſſion, ſuch as Shakeſpeare's Pageant or a military proceſſion, is in itſelf a ſplendid object, which can hardly be ſurveyed without delight. But, ſuppoſe that this vaſt multitude is aſſembled ſolely, as at a coronation or in a triumph, on account of a ſingle perſon, towards whom their own regards, as well as the eyes of all who flock to ſee it, are principally directed; their elevated rank, their gorgeous apparel, their grand equipages, their immenſe number, infuſing the idea of their magnificence into that formed concerning him, muſt contribute greatly towards his agrandizement in the imagination of beholders. A long line of anceſtors, eminent for virtue, for abilities, for power, or for wealth,

(z) Treatiſe of Human Nature, V. 2. p. 1. ſ. 9.

wealth, bears a conſiderable reſemblance to that magnificent ſpectacle, and is contemplated with a ſimilar ſatisfaction. In the one caſe, the members who compoſe it are diſplayed to ſight: In the other, they are exhibited in viſion to fancy: But in both, eſpecially in the latter, a luſtre is thrown by reflection from them around him towards whom its termination ſtretches, and we are filled with an impreſſion as if thoſe mighty perſonages, of whom a memory only is now left upon earth, had been brought into being chiefly to communicate exiſtence to their living repreſentative. Thoſe, whoſe anceſtors, in a generation or two, are loſt in obſcurity, are deprived of this advantage. Ancient deſcent, forming not a component part of the complex idea through which they are perceived, cannot reflect any brightneſs on their appearance.

In fact, in feudal countries, in which a numerous herd, unable to boaſt of finer diſtinctions, is always found, long poſſeſſion of ancient lands is univerſally obſerved to form a principal ſource of the ſentiment properly denominated pride; and this vain conception is mightily ſtrengthened, in all whoſe haughtineſs is erected on that foundation, by the ſtrong continuity with which the ſucceſſive owners are perpetually linked to one another. Each proprietor, in his order, is there brought

distinctly into view: Their riches or their rank, as well as their existence, are fully authenticated by the evidence without which a right cannot be surely established in their fiefs: And a notion must thence arise concerning length of lineage more firm and more lively, than can be produced by wealth among nations in which estates are reducible to fritters by division.

Persons unable to do more, or little more, than earn subsistence from day to day, not having hearts at ease, can hardly pursue after vanities, except in a very humble and contracted line. Bread, and favours immediately connected with gaining it, must commonly bound their views. Not possessed of estates which may be expected to remain undivided or long with their children, they cannot be supposed to look forward for eminence to distant generations: And among any people, placed in circumstances such as have been described, those to whom fiefs belong will probably be the only men to aspire at honours descendible to heirs. On that account, too, they must naturally wish, that their dignities be annexed to their lands; observations, which are particularly applicable to Scotland, and which may be exemplified, perhaps confirmed, from its history.

In this country, a few tradesmen might perhaps

earn, by their employments, a frugal livelihood in old times. But the merchants and the artizans, being moſtly engaged in a loitering retail, confined to little booths and to ſmall wares, without boldneſs of enterpriſe, without extent of adventures, without ſkill in arts, without inclination to work, without commodities to ſell, could rarely arrive at opulence, or even leave their families independent. The bulk of the tenants, without leaſes, without ſtocks, without tools, without huſbandry, without crops, were objects of pity rather than men of ſubſtance (*a*). The peaſants and the labourers, wanting many of the conveniences, and pinched even in the neceſſaries of life, generally dwelt in miſerable hovels amidſt extreme indigence and a ſervile dependence: And among the Scots, the only citizens, except the clergy, (if an order, which had engroſſed near a half of the kingdom, can be accounted an exception), who then lived either in grandeur and in independence, or in ſecurity and in plenty, were the owners of lands.

Uneducated men, who have amaſſed large eſtates in trade, rarely diſplay, in their ways of employing them, more than in their manner of behaviour, the elegance and the taſte conſpicuous in

(*a*) Parl. 1429. ch. 125.—Parl. 1449. ch. 17.—Parl. 1469. ch. 44.—Parl. 1493. ch. 79.—Parl. 1587. ch. 115.

in perſons who, from their early years, have been familiariſed to gentility and to ſplendour; and on that account, as well as from prejudices in themſelves abundantly ſenſeleſs, but at the ſame time extremely difficult to be entirely conquered, are ſeldom viewed, even in commercial nations, in a light equally reſpectful as thoſe fooliſhly denominated their betters. Their riches ſitting not, more than their fineries, eaſily upon them, excite not in the multitude, who judge by appearances, ſentiments alike favourable as are naturally produced by the external aſpect of others diſtinguiſhed by ſuperior grace: And if even in our days huſbandmen, artificers, and merchants, dare not aſpire to Peerages at London, in vain ſhould they have formed pretenſions to nobility at Dunſtaffage in ancient times.

The only tradeſman, ever ennobled in Scotland, ſeems to have been Robert Cochrane. James III. who delighted in curious arts and in their amuſing productions, more than in the burden of buſineſs and in councils of ſtate, either from the ſoftneſs of his genius, or from the delicacy of his taſte, ſpent much of his time, in retirement from both, among a few artiſts, Roger a muſician, Leonard a ſmith, Hommil a tailor, Torſifan a fencer, in whoſe fellowſhip his mind, unbending itſelf with freedom, found more enter-

tainment than in the company of his nobles. Among others, Cochrane, an ingenious maſon, acquired a principal ſhare in his affection; and James, not contented with beſtowing on that minion the rich Earldom of Marre (*b*), inveſted him with the entire direction of public affairs. The conſequences are well known. Marre, amidſt his excellency in architecture, was wholly unworthy of the high political ſtation to which he had aſcended. A conſpiracy, excited by indignation, was ſoon formed againſt his life: His Sovereign, whoſe own majeſty amidſt its rage could not be ſecured from inſult, was utterly unable to protect his miniſter againſt its fury: And the favourite, having been ſuddenly apprehended at Lauder, was inſtantly hanged over a bridge, almoſt in the Royal preſence. Promotions entirely contrary to uſage, and of courſe to expectation, ſhock the current in which our conceptions are accuſtomed to flow, and ſeeming unnatural, it is almoſt impoſſible ever to be fully reconciled to them; but they are uncommonly offenſive to the ſuperiors with whom you are exalted into contact, perhaps even more than to the equals over whoſe heads you vault. Cochrane's original occupation conſtituted a chief objection to his great elevation. "Wiſe and ancient Lords," Lindſay ſays,

(*b*) P. 207. above.

ſays, " exclaimed upon it, that James had made " fellows!—maſons!—men who ought rather to " have been holding the plough, or to have been " keeping ſheep—Earls and Lords! (*c*)" An amuſing ſpecimen of the haughty language with which claſſes of citizens, the moſt uſeful in ſociety, are often treated; but an example exceedingly apt for illuſtrating the prevailing inſolence of former ages.

In a heathy ſavage poor country, ſubject, like Caledonia, to the combined influence of all the foregoing cauſes; in which the feudal law domineered with a rigid ſway; in which landed men, the only people who enjoyed in fulneſs the comforts of life, were continually ſurrounded by retainers, their inferiors far in every article of exterior appearance; and in which of courſe pride, a paſſion ultimately founded on compariſon, could not but be highly inflated in their breaſts; the proprietors of fiefs, durable things, which perhaps had already deſcended to them in a long ſeries from their anceſtors, and which, in a progreſſion perpetually connected in its members, they expected to tranſmit to their poſterity, were the only perſons who in ancient times either could themſelves, or would ſuffer others to aſpire

(*c*) Pitſcottie, p. 134. &c. 142. 150.—Hawthornden, p. 123. 130, &c. 159.

to nobility. Their houſes could alone cheriſh any aſſurance of being clearly remembered in their ſucceſſors; and ſuch as not only were themſelves high in rank, but whoſe repreſentatives had a probable proſpect of remaining long in an elevated condition, could alone form the ambitious conception of obtaining noble diſtinctions for their heirs in perpetuity.

As chieftainſhip, influence, juriſdiction, wealth, independence; all were of old annexed in that country to property in land, the imaginations of its owners would be frequently conveyed with complacency to the immediate ſource of their grandeur; and their eſtates, by which they were exalted above their neighbours, and in which they were wont to reſide, would naturally be regarded by them with exultation as well as with fondneſs. Hence an idea of that, which in the fooliſh language of vanity is ſometimes termed a family, would be produced among them in peculiar force: And as this conception depends on identity of eſtate, and perpetuity of ſucceſſion or indiviſibility of heritage, without which it can hardly exiſt (*d*), a compounded and ſtrong attachment would naturally be excited to that family, including both the parcel of lands belonging to it, and the ſeries of perſons expected to

(*d*) Treatiſe of Human Nature, V. 2. p. 1. ſ. 9.

to inherit them. Each ſucceſſive proprietor, running in fancy along the line of his anceſtors, would perceive, with delight, that his dignity ſeemed to be increaſed by the length of his pedigree; and as, in the heir of his fortune, he beheld the perſon in whom both his memory and his race were to ſubſiſt, a heſitation could hardly be entertained a moment in his mind about the courſe in which his honours ought to be ſecured to deſcend. Every honour, intended to aggrandize his houſe, would be incorporated with the fief to be poſſeſſed by its repreſentative; an union entirely agreeable to the ideas primarily entertained at conferring them. In fact, nobility was originally united there to lands; and principles, ſufficiently powerful, as well as exceedingly likely, have (*e*) been ſuggeſted, which in Scotland might lead to this junction. Among us, the firſt honours, by which families were ennobled, unqueſtionably were territorial; and, having once ſettled in that channel, the ſame cauſes which had forced them into it, eſpecially the barbariſm in which the country was involved, would make it late before they could be diverted into another courſe. Barbarians, from ignorance, from ſtupidity, and from habit, are always conceited of their own cuſtoms: Violent prejudices,

(*e*) P. 96. &c. above.

tinctured with ſcorn and even with malignity, are commonly borne by them againſt ſtrange modes: And impartial inquirers, acquainted with either the former or the preſent ſtate of North Britain, will not find many circumſtances, which, in the fifteenth and the preceding centuries, could there beſtow a high price on perſonal nobility among any who could pretend to it.

SECT. II.

Cauſes which retarded the Introduction of Perſonal Dignities into Scotland.

IN refined ages, in which public diverſions, genteel company, polite converſation, or literary ſociety attract great multitudes of people into large cities; in which the ſexes, mingling together in frequent aſſemblies, employ much attention, and even art, on heightening the charms beſtowed on them by nature; and in which, ſuch as have been born to independent fortunes, ambitious of adding acquired influence to natural advantages, become fond to hang about palaces and on the favour of Kings; garters, ſtars, titles,

titles, every thing, which, announcing their poſſeſſors to be perſonages raiſed above the ordinary level of thoſe who can afford to array themſelves in gaudy apparel, procures a favourable reception in the high circles of the world, muſt be conſiderably prized. In populous towns, in public places, and even about royal courts, the bulk of mankind are loſt in the vaſt crowds which encompaſs them, and one can hardly engage any notice without great wealth, external pomp, or extraordinary merit; cauſes which, among the few to whom their influence reaches, tend rather to inflame than to extinguiſh rivalſhip and emulation. Hence, ingenuity muſt be ſtrongly excited there to diſcover objects, whoſe imaginary luſtre ſhall command uncommon reſpect; and an artificial quality, conſiſting in diſtinctions almoſt entirely nominal, (which often produce effects little inferior to things real and to ſolid excellencies), and adapted to impoſe on inconſideration, on credulity, on neceſſity, and on fear, has been invented, eſpecially under monarchies, to exalt in degree thoſe already poſſeſſed of other ſources of ſuperiority, or by preſumption to ſupply the want of them. But in rough and unlettered times, in which the dominions of a ſovereign conſiſt moſtly of deſolate and barren moors; in which the inhabitants ſcattered over them, miſerably

ſerably poor and almoſt naked, are ſcarcely entitled to a higher denomination than that of ſavages; and in which men of eſtate, inſtead of thronging into cities to enjoy the elegancies of cultivated life, ſequeſter themſelves within their own territories, in proud and gloomy caſtles, rarely beholding any equals, or little accuſtomed to their fellowſhip; things merely honorary and ornamental, bringing no ſolid advantage to their poſſeſſors, and making ſcarcely any addition to their rank, however they may not be wholly deſpiſed, muſt always form unimportant objects, and invention will not be greatly ſtimulated to ſearch after them.

Want of great cities.

My Lord, on inquiry, your Lordſhip will diſcover that few or none of thoſe cauſes, which might give riſe to perſonal nobility, exiſted early in Scotland. Amidſt great ſloth, bad agriculture, little trade, and coarſe manners, large cities, which are moſtly filled with merchants and with artizans, and with thoſe to whoſe luxury they adminiſter, can hardly ariſe: And we have little ground, either from the imperfect views exhibited in hiſtory of the ancient ſtate of the Scotch boroughs, or from the exacter deſcriptions of the diminutive condition in which they were ſtill beheld immediately before the Union, to imagine, that during the reigns of the Davids, the Alexanders,

anders, and the Roberts, there was between the Solway and the Orkneys a ſingle town which contained five thouſand inhabitants.

In old times, Parliament was held at Scoon, at Cambuſkenneth, at Dunblane, at Dairſey, and at other ſmall villages (*f*), at which either few members aſſembled, or thoſe who attended muſt have ſlept in the fields or lodged in hovels. It did not become uſual, till the days of James II. for the ſtates of the realm to convene in Mid-Lothian. During the minority of James VI. a Parliament was held in 1578 at Stirling: Another was convoked at Linlithgow in 1585: A third met at Perth in 1606.

Under every regular and free government, the members who compoſe the legiſlative council and the ſupreme courts, added to the retainers who belong to them, form a numerous, often an opulent body; and the vaſt concourſe continually drawn thither by buſineſs, by curioſity, and by avarice, fails not gradually to aggrandize the conſpicuous theatres to which moſt eyes are allured by their ſeſſions. But till the fifteenth century no particular place had arrived either at the excluſive enjoyment of theſe advantages, or at a great pre-eminence on account of the ſuperior

(*f*) Fordun, l. 13. c. 34. 36.—Ad. Caſe, ch. 5. p. 9.—Pitſcottie, p. 364.

perior accommodations found at it; and, after a diligent ſearch, you will find it difficult in the whole kingdom to diſcover any which had indiſputable pretenſions to the appellation of metropolis. The judicial authority was moſtly diſcharged by proprietary magiſtrates, whoſe territories were bounded by the marches of their lands. A Juſticiary General, it is true, poſſeſſed the ſupreme power in criminal matters: But his office, during a long period, was hereditary; and as large eſtates were generally created into regalities, which implied a privilege of reclaiming for trial all who lived in them even from that ſovereign judge, and as Parliament was wont to take cognizance of treaſons againſt the ſtate, his interpoſition was in moſt caſes excluded, or was beheld in few. Hence, in record, that great officer makes neither the frequent appearances nor the ſtriking figure which ſeem proportioned to his high authority: And no ſtationary (*g*) tribunal, inveſted with a tranſcendent juriſdiction extending all over the nation, and appropriating long ſtated terms to exerciſing it, was eſtabliſhed to decide civil cauſes (*h*) till the College of Juſtice, the ſame which ſtill ſubſiſts, had been erected by Parliament in 1532, and was ordained to hold its ſeſſions conſtantly at Edinburgh.

This

(*g*) St. Rob. III. c. 30. 34. 45. (*h*) Buchanan, l. 14. c. 43.

This city, amid the advantage of a ſituation which, for healthfulneſs, for beauty, and for ſtatelineſs, is equalled by few in Europe, without grand edifices to behold, clean ſtreets to walk, or even commodious houſes to inhabit, invited not ſtrangers, either by the variety or by the elegance of its entertainments, to reſort to it. An univerſity at which the ſciences, an academy at which the exerciſes, even a ſchool at which the languages might be learned, was not early erected in that borough. From the narrow limits within which the capital continued to be circumſcribed in the ſixteenth century, and from the open fields which ſtill remained within its franchiſes in 1579 (*i*), it ſeems not probable, that even in the reign of Mary more than ten thouſand or fifteen thouſand people dwelt within its walls: In the days of David I. Edinburgh was not greater perhaps than Peebles is at preſent (*k*); and its ſuburbs, however enlarged of late years, were not then extenſive or well inhabited.

Her predeceſſors, the Kenneths, the Malcoms, the Duncans, and their ſucceſſors, during many reigns, reſided at a diſtance from the frontiers of England; but their reſidences, being almoſt every where expoſed to inſult, were not long fixed, and their ſubjects were not excited by any other powerful

(*i*) Maitland, p. 138. 139. 185. (*k*) Qu. At. c. 79.

powerful temptations to gather in ſettlements around their habitations.

In the country, a mean cunning and other low vices, connected with the debaſing apprehenſion of penury and of oppreſſion, are ſometimes found; yet men are commonly leſs debauched, their manners are generally purer, and perhaps, upon the whole, they are more virtuous and more happy, than in towns; the ſinks into which, Tacitus (*l*) ſays, every thing filthy and atrocious is continually pouring: It muſt however be confeſſed, that as the human mind cannot attain either the accuracy or the inventions, and as individuals cannot enjoy the independence, ſo arts cannot reach the perfection, and ſociety cannot exhibit itſelf in the magnificence which may be produced by the co-operation of the wealth, of the wants, of the ingenuity, of the emulation, and of the force of vaſt multitudes of people collected together into great cities. Times of ſenſe therefore and of improvement, viewed in a particular light, muſt be owned to be alſo times of vanity and of imbecillity; and perſonal nobility, a principal part of public ſplendour, probably would not be early introduced in a nation, which, wanting an elegant and even a decent capital, was placed in a condition unfavourable to its diſcovery, unleſs ex-

(*l*) XV. Annal. 44.

extraordinary circumſtances forwarded its introduction. Trains of nobles are appendages of royalty, and a brilliant court will naturally produce them; but Scotland can ſcarcely be ſaid to have poſſeſſed even this advantage. The parity, agreeable to governments which are either perfect commonwealths, or ſtrongly inclined to that model, recoils at the inequality implied in nobility. From the conſtitution of its parliament, and from the unrulineſs of its army, the Caledonian government appears, during many ages, to have partaken of the nature of a republic much more than of a monarchy; and, in that kingdom, people of property, being little tempted to dance attendance at the levees of their princes, could not be greatly diſpoſed to promote introducing among them a ſet of noblemen who were to derive their dignity from another ſource than lands.

Want of a powerful court.

A Scottiſh King, ſurveyed with accurate eyes, will be perceived then to have been little more than chief commander of their feudal militia: And as in war their troops were not formed into regiments embodied under officers appointed by the Crown, but each chieftain led his own tribe, and as almoſt every ſubaltern laid claim to a determinate poſt from ancient inheritance, few, or rather no military commiſſions, either ſubordinate

nate or general, were at the royal diſpoſal (*m*).

Permanent taxes were long almoſt totally unknown in Scotland. Even extraordinary aids were rare (*n*). The public revenue, therefore, conſiſting chiefly in the deſmene lands of the crown, and in the feudal incidents of ſovereignty (*o*), could not but be very narrow. The regal authority, too, was extremely circumſcribed; and au-

(*m*) Fordun, l. 5. c. 9. 36.——Major, l. 3. c. 5.—Buchanan, l. 7. c. 14. 20.——Anderſon's Diplom. 43. 44.——See Hawthornden, p. 294. 295.——Pitſcottie, p. 319. 320.—Parl. 1600. c. 21. (not printed.)

(*n*) During the minority of James I. the Duke of Albany reſiſted an impoſt of twopence, that parliament was going to lay on each houſe in which fire was lighted, ſaying, that no tax had been impoſed during his Regentſhip, and that the poor would curſe the man who ſhould introduce ſuch an abuſe. Even a tribute entirely agreeable to the feudal cuſtoms, which admitted of a tax to raiſe money for redeeming the Sovereign from captivity, impoſed for diſcharging the ranſom (L. 30,000) of James I. was exceedingly unpopular; and the King, after having levied the firſt payment, was obliged to remit the remainder.—Fordun, l. 15. c. 21. l. 16. c. 9. 13.—Major, l. 6. c. 10.——Parl. 1424. c. 10. 11.—Buchanan, l. 10. c. 27.—Hawthornden, p. 16.—Rymer, X. 299. 303. 322. 325. 326.

(*o*) Parl. 1483. c. 106. § 5.—Parl. 1476. c. 86.—Parl. 1489. c. 24.—Parl. 1493. c. 83.—Parl. 1581. c. 36.—Parl. 1587. c. 29. 31. p. 542.

the Prince, whoſe only guards (*p*) were politic conduct, could not excite awe, either by the grandeur in which he lived, or by the attendants who waited on his family.

A potentate, who, with the name of King, was no more than a ſuperior ſort of Laird (*q*), could not expect that grandees would ſtoop to diſcharge ſervile offices about his perſon. Amidſt a mimicry of royalty, many of thoſe places which are commonly eſtabliſhed in the houſeholds of Princes, as well as the principal military commands, ſeem, on that as much perhaps as on other accounts, to have been early alienated from the Scotch crown, by perpetual grants in inheritable fee. The royal houſehold was governed by a hereditary maſter: A hereditary butler kept the royal cellars: A hereditary uſher introduced to the royal preſence: A hereditary cupbearer ſerved the royal wine: Even a heredi-

 tary

(*p*) Till the days of James VI. to whom, after the raid of Ruthven, parliament, in 1584, granted a guard of forty horſemen, with two hundred pounds a-year to each, payable out of the firſt fruits of vacant benefices. Parl. 1584. c. 13. and act 14th (not printed) of that parl.—See p. 136.

(*q*) In Scotland even prayers ſeem not to have been offered up in church for the preſervation or the family of the King, till that diſtinction, obtained from the clergy by James I. had been authoriſed by parliament during his reign. Parl. 1424. c. 43.—Parl. 1425. ch. 62.

tary carver cut the royal meat: And either the duties of these offices might be performed by deputies, or personal attendance was not expected from the Lords who held them.

The Sovereign, without magistrates to nominate, without officers to appoint, without revenues to distribute, had little to bestow. In consequence, the royal favour was not an important acquisition. During those fierce ages, in which our legislative body, from the sturdiness of its construction and the unpliableness of its parts, had not become a manageable, hardly an ordinary member of the political machine, interest and weight at Scoon, or even at Holyroodhouse, depended not on the number of mercenaries whom a man commanded in the senate, but on that of the partizans whom he could bring into camp; and the surest hopes of succeeding in any requests at the foot of the throne, were entertained by those who could render themselves formidable in arms. The court of Abernethy therefore, or that of Dunfermline, without vacancies to fill, without expectations to raise, and without power to delegate, could not but be poorly attended.

The custom of living at a distance from court and from town.

Among a people, who neither lived in town, nor attended at court (*r*), but were thinly dispersed

(*r*) Buchanan, l. 10. c. 41.——Melvil's Mem. p. 377.

perſed over a barren land, largeneſs of eſtate, extent of juriſdiction, multitude of followers, were articles ſubſtantially uſeful, as well as exceedingly flattering; but either from a ruſtic pride, from a phlegmatic apathy, or from juſt conceptions, empty honours, which brought little ſolidity along with them, might remain unſolicited, or ſometimes be rejected with contempt. At Vienna and at Paris men far advanced in years, of the firſt eminence, and of the beſt ſenſe, with ſolicitude and with ſervility pant after ribbands of ſilk and croſſes of ſpangle; but in remote provinces people are careleſs even about dreſs, becauſe their conſequence depends not upon it; and noble dignities are generally either altogether unknown, or little uſed, in wild regions. In hilly deſerts, a ſuperior among his vaſſals, a chief among his clan, a landlord among his tenants, finds mere gewgaws little neceſſary or little important to his aggrandizement; and even in our days, a gentleman, whoſe thoughts roll not towards London or St James's, and whoſe neighbours are not infected in their ſentiments from acquaintance with theſe places, needs not a title to add to his importance in Bara or in Viſt. In old times, in which every conſiderable eſtate was erected into a petty principality, property and deſcent would generally be found of themſelves ſuf-

ficient to procure one in his own domains all the reſpect and all the ſubmiſſion which vanity and intereſt uſually demand; adventitious advantages, which perſons of ſmall fortune and of ignoble birth might affect, if not attain, would often be deſpiſed or overborne; and many, even among thoſe poſſeſſed of eſtates in land, would not be deemed worthy of nobility.

In a clan, ſubordination is neceſſary, as well as in an army: An inferiority is implied in vaſſalage: And a partizan or a vaſſal, even though he held ſome of that ſpecies of property, durſt not aſpire to independence on his chief, or to equality with his ſuperior. In every country, in which the prejudice inſpired by a barbarous cuſtom prevails over the juſtice demanded by natural affection, younger children, ſeemingly neglected by their parents and by law, in a few generations muſt mingle in obſcurity among the herd of mankind; and an affectation of any dignity, by which they ſhould be lifted near in rank to their eldeſt brother, the idol cheriſhed with partiality by both, would be deemed, in perſons reckoned hardly worthy to gather the crumbs from his table, a declaration of hoſtility, or an act of treaſon.

Hence nobility was long almoſt excluſively confined among the Scots to great, and even to

chief families; and very large eſtates were alone raiſed to noble honours. Our ancient Earldoms ſeem to have been extremely few in number: Perhaps at no one period did they ever amount to forty. Thoſe few which exiſted, Fife, Marre, Lennox, Sutherland, Roſs, Menteith, Carrick, Athole, were all poſſeſſed by principal and very powerful houſes; and hereditary dignities, having once been united to lands, would not ſoon be ſevered from them in Scotland.

Its inhabitants, ſcattered in a cold and ſurly latitude, among rugged and inhoſpitable mountains, or over bluſtering and inacceſſible iſles, waſhed by the fartheſt ocean of the Weſt, and removed towards the northern extremity of Great Britain, at a diſtance from the reſt of Europe, were ſeldom viſited by ſtrangers; and maintaining little intercourſe with other nations, either wanted adequate opportunities of becoming acquainted with foreign manners, or had not a turn ſufficiently liberal to adopt ſuch as were preferable to their own. Hence improvements, and even changes, were wrought ſlowly on the cuſtoms and the practices of the Scots. The haughty prejudices inſpired by the feudal ſyſtem were fondly nouriſhed in their breaſts; and forms and uſages, as well as ideas and ſentiments, agreeable to theſe, continued long to prevail among them.

Strong prejudices in favour of the feudal cuſtoms.

It was only by an exertion, made in England not forty years ago, that tenants were at laſt reſcued from the ſervile ſtate in which they had till then been kept in the North, and that landholders were finally delivered from the oppreſſive conditions of military tenure (*s*): And in a deſert overgrown with clanſhip, with barbariſm, and with heath, without large cities, without grand aſſemblies, and without wealthy tradeſmen, it would be late before proud and powerful Barons could endure to behold a rank, equal to that ſuſtained by the ancient inheritors of noble fiefs, and from habit ſuppoſed to belong peculiarly to them, conveyed to perſons whom, in their moments of inſolence, they might term mean upſtarts, by thoſe ſlender vehicles, parchment and ink, not conſolidated with any dignified eſtate, and entirely independent of landed property.

SECT. III.

Noble Honours, diſconnected from Fiefs, were probably introduced into Scotland about the Time of James the Firſt.

FROM the ignorance or the careleſſneſs of the Scotch hiſtorians, from the ſcantineſs and the defec-

(*s*) 20mo G. II. c. 50.

defectiveneſs of the public records, and from the inaccuracy or the indiſtinctneſs of both, it is now become almoſt impoſſible to aſcertain, with preciſion, the time at which perſonal dignities were firſt introduced into Scotland: But we can approach very near it; and, if one might venture on a conjecture, I ſhould point to the reign of James I. for the period about which the innovation was moſt probably made. This prince, whom his father Robert III. had been adviſed, either for the ſafety of his perſon, or for the improvement of his mind, to ſend at a tender age into France, happening on his voyage to put aſhore near Flamborough, was made priſoner by the people of Yorkſhire (*t*). Henry IV. who, on the depoſition of Richard II. had been raiſed to the throne of England, then reigned in that kingdom. Tempted by the mighty advantages, which it was not unnatural at firſt ſight to imagine might accrue to his own ſubjects from holding in captivity the heir-apparent of an inimical ſtate, his lofty ſpirit, which had early formed the magnificent idea of obtaining poſſeſſion of the Engliſh Crown, unable to reſiſt ſeizing on the ſplendid prize which had been thrown by fortune in his way, lent a deaf year both to the pathetic

(*t*) Fordun, l. 15. c. 18.—Boet. l. 16. p. 352.—Major, l. 6. c. 8.

ſupplications preferred by an aged parent in behalf of his only ſon, and to the generous counſel, dictated perhaps by ſound policy as well as by fair hoſpitality, of ordering the Duke of Rotheſay to be reſtored to liberty. Henry's mind, however, neither forgetful of the conduct which it became his own dignity to hold, nor inſenſible to the feelings of humanity, did not permit him to neglect the education of a young prince, whom a miſplaced confidence or an unfortunate accident had reduced under his power. Much attention was beſtowed on inſtituting the king of Scotland; and natural parts, or natural diſpoſition, rendered James not an unhappy ſubject of the liberal pains which were employed on their cultivation. Literature, and the unqueſtionable ſuperiority as well as tranquil enjoyments derived from it, command an awful admiration in the ſecret thoughts even of thoſe brutal ſpirits, who, either from a conſciouſneſs of inferiority, or from innate doltiſhneſs of ſoul, affect to deſpiſe them. But a natural elegance of taſte, united to a conſiderable vigour of underſtanding, produced in James a ſincere love of knowledge; and, during his reſidence in England, he made a great progreſs in acquiring it (*u*). In thoſe days the ſouthern parts of

(*u*) Fordun, l. 16. c. 28. 29. 30.—Boet. l. 16. p. 353. —Major,

of Great Britain, compared either with the improved condition in which they are found at present, or with the ſuperior politeneſs at which the Papal territories had then arrived, may well be pronounced to have been extremely rude, but ſtill were incomparably more civilized than the ſtormy region north of the Tweed: And James, on returning into his own dominions, polite, accompliſhed, and learned, after a reſidence of eighteen years in the Caſtle of Windſor, about the Court of London, or in camp on the continent, was both ſhocked and aſtoniſhed at the miſery and the groſſneſs in which his people were involved. A thieviſh habit, a baſe revengefulneſs, a relentleſs cruelty; vices incompatible with the welfare, and almoſt with the ſubſiſtence of ſociety; were found by him to be very generally prevalent, eſpecially among his mountains, and even to be favoured by the whole genius of the ancient conſtitution, as well as by the inveterate prejudices of his ſubjects: The devoted attachment maintained for their chiefs by the hordes of dependants who were continually encamped about their caſtles; the mutual ſupport blindly afforded by each clan to all its members againſt every other; the extreme difficulty which public juſtice

Major, l. 6. c. 14.—Buch. l. 10. c. 13. 14. 52. 57.—Leſlie, vii. 56.—Hawthornden, p. 12. 49. 50.—Hume, ch. 18.

juſtice found in reaching their rugged retreats. Hence violence and rapine prevailed, and were even honoured, over a wide extent of the country: Property, tranquillity, life, held on a precarious tenure, could not be ſecurely enjoyed: Honeſt induſtry was deſpiſed, or was not encouraraged (*x*).

Evils, ſo deeply rooted in the temperament of the Scots, would be extremely difficult to correct: But a high indignation was excited by them in the noble mind of James; and his good ſenſe, perhaps better than any ſcholaſtic tutorage, would naturally form to itſelf a rational ſyſtem of ethical principles, founded on an inſtructive contemplation of his eſſential conſtitution, for the regulation of his conduct in the important ſtation which royal birth had called him to fill. A recollected obſervation of the effects, conſtantly experienced on his ſtate from his actions in all their variety, ſuggeſts to every conſiderate man, that the diſſoluteneſs or relaxation of parts, inſeparably connected with inaction, ſeldom fails to produce a wearineſs of exiſtence, which makes life inſupportable even to thoſe ſeemingly poſſeſſed

(*x*) Hawthornden, p. 24. 25. 30. 212. 213. — St. Robert III. c. 42.—Parl. 1424. ch. 50.—See Parl. 1581. ch. 16. —Parl. 1594. ch. 231.—Parl. 1597. ch. 266.—Parl. 1609. ch. 7.—Pitſcottie, p. 228.

ſed of every advantage to render it comfortable; and that the lively feelings, in which happineſs conſiſts, depend chiefly on a well directed employment. Wiſdom therefore, not to inſiſt on views of duty, admoniſhed him ſtrongly againſt indulging himſelf in indolence; and the miſerable condition, in which his kingdom was found, afforded him, in an undertaking ſufficiently arduous, an ample field for virtuous activity. His benevolent heart, glowing with affection to his ſubjects, was prompted by its native warmth to ſtrenuous exertions towards delivering them from their barbarity: And the oppoſition expected to his patriot efforts from ſelfiſhneſs or from prejudices, and his uncertainty of ſucceſs, added to the difficulty of obtaining it, ſerved only to inflame his ardor and to increaſe his vigour. His ſteady ſpirit, neither deterred by danger, nor ſhrinking from toil, but irritated and even ſtrengthened by obſtacles and by reſiſtence, deſpaired not, by judicious and firm interpoſitions of the legiſlative power and of the judicative authority, to accompliſh a great reformation both on their ſentiments and on their habits. The whole machine was found by him in univerſal diſorder: Every member was disjointed, and every part required adjuſtment. It behoved therefore his plans to be extenſive: And your Lordſhip, on peruſing his ſtatutes,

ſtatutes, or on conſulting his hiſtorians, will find that few matters, which were ſuggeſted by the immediate diſtreſſes of his countrymen, or which might probably contribute to their felicity, eſcaped his notice, or were overlooked in his ſchemes. To his patriotiſm Scotland is principally indebted for its improvement.

As the mighty influence, derived from landed property, was diſtinctly perceived by him to be a chief cauſe of the wildneſs and the ferocity with which his territories and their inhabitants were over-run, one principal object, towards which his attention was directed, was the reduction of its exorbitance. It would however be abſurd to pretend, that in the improvements meditated by him his eyes were primarily fixed on the introduction of perſonal dignities. His immediate as well as grand aim unqueſtionably was to diffuſe and to enſure ſolid and political happineſs, that is, plenty, freedom, ſafety, knowledge, and civility, over his dominions. But ſome of the meaſures, adopted by him for this purpoſe, tended directly towards diſuniting honour from property; and others (*y*), ſeemingly remote in connection from that innovation, were related, at leaſt at a diſtance, to thoſe views which may reaſonably be ſuppoſed to prevail at eſtabliſhing it. A king, intent on leſſening

(*y*) See note (K) at the end of the volume.

ing the inordinate conſequence of land, would humble as well as curb the ſuperior, and elevate as well as inſpirit the inferior ranks among his people; and James might naturally think, without beſtowing a noble denomination on their eſtates, of conferring on ſome perſons, whom competent fortunes ſhould prevent from ſeeming improper companions (*z*) for him, and whom uncommon merit rendered worthy of that high diſtinction, the ſame titles which had uſually been derived by a reflex communication from fiefs.

It is certain that conſiderable alterations were commenced or projected by him in the forms of government, in the adminiſtration of juſtice, and even in the departments or names of office; and among the multiplicity of deſigns, which engaged his thought, it ſeems not improbable that the nature of honours, and the orders of the ſtate, underwent an examination during his reign. Parliament itſelf was attempted in his days to be modelled after the Engliſh faſhion; and the change, begun to be made by him on its frame, led immediately towards introducing perſonal dignities.

James I. altered the conſtitution of Parliament.

In former reigns, this aſſembly had rarely been convened, and its ſeſſions had always been ſhort. James, knowing that his ſchemes might be much for-

(*z*) Comites.

forwarded by the great weight derivable to them from the general approbation of his ſupreme council, reſolved both to convoke that body more frequently, and to extend the ſubjects of its deliberation farther, than had been uſual in preceding times. During the few years which paſſed after his return from captivity, thirteen different parliaments were held in Scotland; and your Lordſhip will find their ſtatutes directed to a vaſt variety of matters proper for legiſlative regulation.

The ancient Barons, whoſe dull ſpirits were almoſt totally incapable of being rouſed without violent exciters, generally found a higher reliſh in rural ſports than in political debates. Hence, in that convention, it had long been cuſtomary for the members to officiate by proxies; a privilege ſeemingly repugnant to the nature of a deliberative aſſembly, entruſted to hold conſultations about public weal (*a*). Its abſurdity was ſoon noted by James; and, in his third parliament, an act was paſſed, ordering all thoſe, who were bound to be preſent, to attend in perſon (*b*). It is not unlikely that the King, in procuring this regulation, deſigned to diſplay the real impracticability of perſonal attendance; and, by affording a trial of its inconvenience, to ſmooth the way for

(*a*) Parl. 1640. c. 20. (*b*) Parl. 1425. c. 58.

for the grand alteration which he had in contemplation to make on the conſtitution; or, perhaps, he meant, from numbers and from unanimity, to derive ſtability and force to his purpoſed innovation. James's views were certainly more extenſive, for his underſtanding was more maſculine, than one ſhould expect either from a royal education or from his illiterate age; and a full convention of all the vaſſals, who held of the crown, would quickly be perceived by his penetration to be an aſſembly debaſed by ignorance, liable to paſſion, guided by prejudices, intractable to reaſon, unwieldy in itſelf, and formidable to its Sovereign. In England, the advantages derived to the people, as well as the dignity attained by the Monarch, from the diſtinction eſtabliſhed there between the nobility and the commonalty, had not eſcaped his obſervation; and he had remarked, that, in the conſtitutional ſuperiority beſtowed on the former order, who were generally attached to the crown, the alone ſource of their eminence, a proper balance was found to ſupport and to protect both the Prince and the commons againſt the haughtineſs and the oppreſſion of the other owners of land. It is not improbable that James's diſcerning ſpirit was deſirous of introducing a like diſtinction among his own ſubjects, imagining that a regularity ſhould be acquired from

from it to government, that an authority ſhould thence be given to the laws, and that by their means peace and civility and juſtice ſhould gradually be introduced and diffuſed and eſtabliſhed among his people: And foreſeeing at a diſtance the real conſequence which would finally accrue from an excluſive right to hereditary ſeats in the legiſlative council, he ſeems, in proſecution of his views, to have entertained a deſign of altering the feudal conſtitution of the parliament of Scotland, and of dividing it, like the Engliſh, into two houſes. One houſe he propoſed to form out of the dignitaries ſuperior to Barons; and, in the other, he intended to ſubſtitute a regulated repreſentation inſtead of perſonal attendance.

It would have been too bold a meaſure, all at once, either directly to exalt the nobles, by beſtowing upon them, excluſively, inelective and hereditary ſeats, annexed to their blood, and independent of their property, or to degrade the commoners, by ſtripping them of thoſe privileges to which their freeholds gave an unqueſtionable right; and James probably was aware, that potent Barons might not admit it to be in the power of a feeble Crown to introduce among them an order of men not poſſeſſed of the qualifications which, for time immemorial, had been required by cuſtom. The Scotch King, however,

ever, ventured on making ſome advances towards eſtabliſhing the alteration: But he took care to proceed with a diſcretion, which ſhould prevent it from cauſing offence to thoſe whoſe franchiſes would ultimately be deeply affected by the innovation; and not till, from the immenſe multitude of freeholders, who had probably aſſembled in obedience to his recent ordinance, every perſon muſt have become ſenſible, by a deciſive experiment, of the inexplicable confuſion in which parliamentary buſineſs would be involved by a general indiſcriminate tumultuary attendance. In the year 1427, Dukes, Earls, Biſhops, Abbots, Priors, Lords, and Barrents (*c*), were appointed thenceforth to be ſummoned to parliament by a precept ſpecially directed to each of them, and were even ordered to be received in conſequence of that ſummons (*d*). The other freeholders were not expreſsly excluded from ſitting in it; but a general ſtatute, in which they are all of them, without any exception, indiſcriminately comprehended, as well as diſtinguiſhed from the nobility, under the humiliating denomination of the

(*c*) Probably, Barons or Knights, whoſe large fortune or chief rank entitled them to a banner, to ſupporters, and to ſome other diſtinctions of nobility. St Palaye's Mem. of Chivalry.

(*d*) Parl. 1427. c. 112.

Small Barons and Free Tenants, was paſſed, diſpenſing with their attendance, on condition that each ſhire ſhould chooſe annually, at its head court, at leaſt two commiſſioners, (for the number was not limited), to appear in their ſtead. The deputies ſent by the counties were not to be honoured with ſpecial ſummonſes, but to be impowered by commiſſions (*e*), authenticated under the ſeals of the ſheriffs and of ſeveral barons of their ſhires, to hear, to treat, and to determine, on all affairs brought before parliament, and were alſo, in ſome ſort, to be ſeparated from the other members: For they were ordered to elect a wiſe and expert man, to be named the Common Speaker of the Parliament, whoſe buſineſs it ſhould particularly be to propoſe there all matters pertaining to the commons.

In this indirect way inelective feats were attempted to be taken from ſimple baronies, and to be confined to noble denominations: And the right conferred by the act of 1427 on thoſe, who ſhould be ſummoned under the title of Duke, of Earl, or of Lord, to be admitted into parliament, ſeems a nearer approach to perſonal Peerages, than even the power, granted to the Crown by poſterior ſtatutes, of requiring the attendance of any freeholder, whom his Majeſty, by a precept ſpecially

(*e*) See Parl. 1597. c. 276.

ſpecially directed to him, might command to give it (*f*). The latter power, extending only to ſuch as had antecedently a right to ſit, and, in conſequence of their freeholds, might come if they pleaſed without a ſummons; and ſuppoſing that the requiſition made on them was not to be accompanied with any change in their rank, bears little reſemblance to the high prerogative of ennobling by writ: Nor does it appear to have ever been exerciſed by the Crown. An alteration, more violent as well as more extenſive, was certainly produced by a ſimilar ordinance made in the year 1587: Proper Peerages were then introduced by an act, which, without, in direct terms, depriving the ſmall Barons of their ſeats, did little more than grant them a conditional diſpenſation, and even ratified the ſtatute of 1427. It may therefore be pronounced not to be improbable, that, in order to approximate the conſtitution of Scotland, whoſe proſperity James was ſtudious to promote, as near as circumſtances rendered poſſible, to the model of England, which he had obſerved already to be in a flouriſhing ſtate, that perſonal honours were imported by him into that kingdom. A Prince, whoſe plans extended almoſt to every object, would ſcarcely omit an alteration which coincided exactly with the general ſyſtem,

(*f*) Parl. 1457. c. 85.—Parl. 1503. c. 113.

ſteadily purſued by him, of degrading landed property. Inſtances of theſe dignities, which ſeem perfectly unequivocal, can be diſtinctly traced very near to his days; but not a veſtige of them, except, perhaps, a ſingle example in the royal family, is to be found before his acceſſion: And, on a full conſideration, your Lordſhip will not find, in the whole hiſtory of Scotland, any period about which it is more likely that they were introduced than the thoughtful reign of James I.

SECT. IV.

Before 1587, *Perſonal Honours were not Peerages.*

THE particular Prince, indeed, under whom perſonal titles were imported into this country, is not an extremely important matter: For two propoſitions ſeem undeniable; firſt, That thoſe honours had been brought into it a conſiderable time before the year 1587; ſecondly, That they ſtill continued not to be Peerages till the great alteration then effected on parliament and on them.

In the Scotch records, ſeveral noblemen are

found bearing the titles of Lord and of Earl, long before their lands had been erected into Lordſhips and into Earldoms. The eſtate of Caſſillis continued till the year 1642 to be no higher than a Barony, and was only then formed into an Earldom by Charles I. But Gilbert Kennedy, a grandſon of Robert III. appears to have been created Lord Kennedy about 1459, during the reign of James II. His brother, the excellent Biſhop of St Andrews, in conſequence of his perſonal character, on which high eulogies are beſtowed by hiſtorians, perhaps more than of the near relation in which he ſtood to the King, was long poſſeſſed of the firſt authority in his country: And his grandſon, David Lord Kennedy, one of thoſe who from the folly and the gallantry of their ſovereign periſhed in the battle of Flowden, was advanced to the dignity of Earl of Caſſillis by James IV. in 1509 (*g*).

The eſtate of Home was no more than a Barony in 1509: But, in 1473, Sir Alexander Home had been created Lord Home in parliament. He is one of the few noblemen of whoſe creation a minute is extant in the journals (*h*). His deſcen-

 dant,

(*g*) Caſes exhibited to the Houſe of Lords in 1761 by the Earl of March and Sir Thomas Kennedy.

(*h*) Aug. 2. 1473. Quo die Alexander Home de eodem,

dant, Alexander Lord Home, a favourite of James VI. was created Earl of Home ſoon after the acceſſion of that King to the throne of England. The eſtate, however, had not yet been incorporated into an Earldom; and I am not certain whether it was ever ennobled (*i*).

Perhaps it was intended in 1427, both by the legiſlature to beſtow on the Sovereign, and by James to obtain for the crown, a prerogative of annexing inelective feats to blood alone, and to ſever that privilege from property. It ſeems, however, to be pretty certain, either that this intention was not carried into complete execution, or that a prerogative ſo lofty, correſponding little with the circumſcribed condition in which the royal authority was then found, was never exerciſed by the King. Summonſes are ordered by the act then paſſed to be given to Banrents, but are not allowed to be directed to commoners of inferior degree: And the ſame arguments, which evince that before 1587 territorial honours had not been proper Peerages, eſtabliſh that thoſe noblemen, on whom perſonal dignities were conferred before that year, were not Peers, in the juſt

dem, miles, factus fuit Dominus Parliamenti.—Records of Parl. B. 2. p. 96.—Caſe of the Earl of March.—Lovat Memor. p. 7.

(*i*) See note (L) at the end of the volume.

juſt ſenſe in which this word can alone be underſtood. The right, which they had to vote in that aſſembly, was not derived from their honours, but independent of them: And Buchanan, who could not be ignorant of their effects, affirms (*k*), that an empty title ſtill remained, even in his days, the ſole advantage which their poſſeſſors reaped from them.

The perſonal honours which were introduced by James, or perhaps I ought rather to ſay, which were intended to be introduced by him, were ſtill deſigned not only to be annexed to blood, but to beſtow on their poſſeſſors a ſuperiority above thoſe whoſe eſtates were not inferior to theirs in denomination; and this precedency was to be taken in parliament itſelf, and in preſence of the Sovereign. Hence it is not improbable, that parliamentary conſent was at firſt deemed neceſſary, or at leaſt from prudence was obtained, to their creation. Dignities, conferred after a manner different from the only faſhion which had been uſed for time immemorial, and which, on that account, might alone be reckoned conſtitutional, would naturally be legitimated by acts paſſed by the ſtates of the kingdom. Perſons raiſed to ho-

(*k*) Nunc vero, nec ullus in novis honorum nominibus eſt modus; neque, præter inanem titulum, ullus nominum uſus. l. 6. c. 52.—Buchanan died in 1582.

nours, no doubt, were admitted with ſolemnity to the places belonging to their rank, and their promotion would always be formally authenticated to the houſe. Accordingly, titles or dignities appear from record to have been early granted in parliament: Cincture of the ſword, impoſition of a cap of gold, and other ceremonies, were employed in that court at conferring them: And perſons, ennobled in this way, ſeem to have been peculiarly diſtinguiſhed by the name of Lords of parliament.

The records of our legiſlative council, anterior to the reigns of the Jameſes, are moſtly loſt: That aſſembly, which in 1707 was for ever diſſolved, never to be re-convened after the commencement of the Union, neglected to order full copies of their ancient votes to be publiſhed for the inſtruction or the entertainment of poſterity: And this curious monument of antiquity, which perhaps your Lordſhip will think it a national reproach has not been long ago executed at the public charge, hath not hitherto been even begun(*l*). Hence thoſe volumes, which would certainly throw much light on the hiſtory as well as the laws of Scotland, particularly on the conſtitution

(*l*) I am glad to find, that, ſince the publication of the firſt edition of my Diſcourſe, ſome ſteps have been taken towards printing a full copy of thoſe records.

ſtitution of Parliament, and on the nature of Peerages, buried in dirt, and expoſed to worms and to corruption, are acceſſible to a few Antiquaries only; and not being eaſily read, their contents are little known even among them. I have heard, however, that about thirty-ſeven entries of creations made in the Houſe are ſtill found in the journals. The exact number of thoſe prior to 1587 (*m*), or the preciſe terms in which the minutes relating to them are couched, I pretend not to know: But it ſeems probable, that moſt of the titles, conferred by inveſtiture in parliament, were merely perſonal.

SECT. V.

Deſcent of Perſonal Honours before 1587.

IT is natural at firſt thought to conclude, that theſe titles, not being annexed to lands, or even connected with them, would not be governed in their deſcent by that of the fiefs belonging to the noblemen on whom they had been conferred; but that, being qualities originally be-

(*m*) Mackenzie's Inform. p. 37.

beſtowed on favoured individuals from a peculiar attachment to their perſons, they were always deſtined to proceed in the blood to which they had been united; that, of conſequence, from their primary inſtitution, before as well as after the year 1587, they were limited to deſcendants of the perſons firſt ennobled by them; and that their poſſeſſors never enjoyed a power to alter the courſe appointed for their devolution by the Sovereign. The perſons called by the King to take them in ſucceſſion, being all of them immediate objects of the royal favour, could not be fruſtrated, by a diſpoſition made by a ſubject, of their inheritance. Aliens, from the noble blood in which they inhered, could not in that impure way acquire to their own a quality communicable only by irradiations from Majeſty: And if we were to ſuppoſe that they had been originally deſigned to be borne in Parliament more immediately than in other places, it might alſo be preſumed, that, intended only for ſuch as were capable of giving advice in the national council, they were always limited to heirs-male (*n*); a limitation ſeemingly agreeable to ſome ultimate views, diſcoverable by a profound philoſophy (*o*), which might imperceptibly guide to it.

In

(*n*) See note (L) at the end of the volume.

(*o*) Treatiſe of Human Nature, V. 2. p. 1. ſ. 5. 9. 10.—See p. 230. 231. 232. 237. 238. 239. 240. above.

In consequence of the superiority arrogated to itself by the one sex above the other, children carry the name of their father; families are held to be continued by males; and you may remark, that if, after a long descent, the name is at last changed, or if, even without changing it, a female happens to succeed, a break seems to be made in the race, its continuity is destroyed, and the house appears to be arrived at its end, till, in a number of generations, that interruption comes to be unknown or forgotten. Every thing which conveys the fancy more smoothly and more distinctly from one generation to another, strengthening the connexion arising from blood, or the propensity and the tie which bind relations together in the imagination, must invigorate that conception, and lengthen a line of ancestry; and exclusion of females, and succession of males, as well as identity of estate and sameness of name, (articles to which much attention has been paid in some countries), adding force and liveliness to the perception of the different branches that form a pedigree, it must be owned, convey a firmness and a vivacity to the ideas of the preservation and the representation of families: But I suspect, that they are egregiously mistaken, who suppose these contrivances not to be modern inventions. In ancient times, in which records and history were

were rare and imperfect, they seem not to have arrived in Scotland at that pitch of perfection in either the theory or the practice of the arts of vanity; and those metaphysical refinements, or perhaps natural causes, discoveries of long observation and of deep thought, on which masculine succession is ultimately founded, yielded to parental affection and to other principles, whose operation circumstances rendered more efficacious. Men excluded not their daughters from inheriting their lands: Females were admitted to succeed: Feuds were even divided among coheiresses: Names were little minded in succession: And the greatest estates, as well as the highest honours, passed from one family to another different from it in blood and in denomination (*p*), because land was the possession which was

(*p*) The surname of the Earls of Angus, in consequence of the succession of Matilda, an heiress of the lands, became Umfraville, that of an Englishman who married her. On the forfeiture of Gilbert de Umfraville, the Earldom was conferred on Sir John Stewart of Bonkil; and, after the Earl of Douglas espoused Margaret Stewart Countess of Angus, the surname of the family from Stewart was changed into Douglas.—Rymer, II. 73. 200. 249. 531. 594. III. 52. —See not (F) at the end of the volume; and p. 171. above.

The surname of the old Earls of Marre was Marre; but, by intermarriages, from Marre was altered first into Douglas, then

was principally valued, and to which all honours were annexed or paid.

Real property, noble eſtates, military fiefs, territorial dignities, proprietary juriſdictions, hereditary offices; all were deſcendible to women, and even in ſome caſes partible among them: Shall we ſuppoſe that they were incapacitated to inherit unſubſtantial diſtinctions, whoſe poſſeſſion would afford them peculiar ſatisfaction, and which they were abundantly fitted to enjoy? It ſeems probable, therefore, that perſonal honours were anciently deſcendible at common law to heirs general,

then into Stewart, and at laſt into Erſkine. See p. 164. 205. &c. above.

The ſurname of the Earls of Strathern, from Murray became Stewart, and from Stewart became Graham. See p. 202. 203. above.

That of the ancient Earls of Fife was Macduff, but was afterwards changed to Stewart, the ſurname of the family which ſucceeded to the Earldom. See p. 162. 163. above.

That of the Earls of Buchan, from Stewart became Douglas, and from Douglas became Erſkine. See p. 180. above, and note (N) at the end of the volume.

The ſurname of the family of Gordon, from Gordon was altered into Seton, and from Seton returned to Gordon. Hawthornden, p. 73.—Pitſcottie, p. 48.—Rymer, VIII. 539. 540. X. 127. 154. 174. 204. 266. 309. 338. 677.

Sutherland, that of the Earls of Sutherland, was firſt changed into Gordon, and after ſome generations was again altered into Sutherland.

general, females as well as males; and perhaps it was on this account that, in the cafes of the dignity of Home, and of feveral others which were granted in parliament, no line of heirs, for whom they were intended, is defined or expreffed in the acts of creation (*q*): None is mentioned even in the cafe of Hamilton (*r*). Mere titles are not poffeffions purely mafculine, fuch as males are alone capable to hold; and in ancient times, before 1587, perfonal dignities implied no privilege of which women were not equally fufceptible, and would not be equally ambitious, as men. Precedency, robes, coronets, notice; thefe are objects which female minds are rarely found to defpife.

In Scotland, the heir of the family, the perfon who, by a connection perpetually maintained with the eftate, which perhaps in a long feries had been poffeffed by his forefathers, preferved its continuity, always was a favourite of the law. For his aggrandifement, his anceftor, after having contracted any difeafe which terminated in death, was not fuffered even to do juftice to thofe for whofe fupport nature obliges every man who is able to make provifion (*s*); and things termed heritable were not difpofable there

(*q*) P. 269. above. (*r*) P. 280. below.
(*s*) 15th Nov. 1757, Campbell v. Campbell.

there by teſtament. The ſame partiality is ſtill ſhewn to heirs: Men who are perfectly capable to diſpoſe of their property, and who in clear expreſſions declare their laſt will about its devolution, are yet laid under both diſabilities: And a perſon allowed to ſettle, at pleaſure, ten millions in ſtock, is diſabled to exert a ſimilar power over a yard ſquare of the pooreſt heath in Lochaber. Hence it often happens, that of the ſame ſettlement, which has been formally executed in every reſpect, one part ſhall be diſannulled, while another part is adjudged to be valid. Your Lordſhip, too, will find lawyers who boaſt of the ſuperlative wiſdom of thoſe inconſiſtent, perhaps captious regulations. It was not till 1641 that money, lent on perſonal bonds at intereſt, was eſtabliſhed among the Scots to be deſcendible to the next of kin, and to the executors, of their deceaſed owner. At that memorable period, diſtinctions, which had been highly reſpected before, were brought into contempt; and, as the blind veneration, which had been paid to families, could not miſs to be ſomewhat affected by the levelling ſpirit of the times, a ſtatute, couched in humane terms, was then paſſed "in favour of orphans, of the fatherleſs, and of others (*t*):" But in former days, almoſt every object, in which the ſubtility

(*t*) Parl. 1641. ch. 57.—Parl. 1661. ch. 32.

ſubtility of lawyers could deſcry any appearance of duration, was ſecured to the heir; the idol whom every inſtitution was calculated to aggrandize. Would, then, the repreſentative of the Houſe, who inherited the lands, who enjoyed the authority, and who lived in the caſtle, the valuable poſſeſſions belonging to it, be excluded from any elevation derivable from the perſonal titles of his predeceſſors?

The chieftainſhip was hardly ſeparable from the eſtate: The influence implied in the former could not be retained by one who poſſeſſed not the latter: A woman by whom the lands were enjoyed, if not the chief of her blood, at leaſt the head of her family, could alone be the ſtay of her kindred and the protector of her clan. Every advantage, therefore, which might either increaſe her authority or aggrandize her perſon, would naturally be allowed to her.

The fiefs, which belonged to Lords created in parliament, were generally erected into Lordſhips either at the time of beſtowing nobility on their owners, or after they had been ennobled (*u*).

Empty

(*u*) In 1455, the lands and the baronies of Cadyhow, of Mauchane, of Corſbaſket, and of Kinneil, were erected by K. James II. with the advice and conſent of his three eſtates, into the lordſhip of Hamilton; and, by the ſame act, Sir James Hamilton, their owner, was created a Lord of Parliament

Empty titles, it has been obſerved, were not ſuch valuable poſſeſſions as would be greatly coveted in ancient days. Property, which is ſomething much more ſubſtantial, obſcuring them, would naturally draw them after it. In a few generations, the different ſources from which perſonal and territorial dignities had flowed would be obliterated, and honours would ſoon be abſorbed in all caſes in the eſtates of their poſſeſſors (*x*). It is not likely that ſuch, as had originally been perſonal, ever came to be directly diſpoſable by the perſons who enjoyed them, either with or without the fiefs belonging to their owners. But the great number of thoſe which had been derived immediately from lands, the ſuperior antiquity of ſuch as had been acquired in this manner, the ample powers allowed to be exerted over them by their proprietors; theſe circumſtances,

T

liament.—Charter printed from the original in the archives of the Duke of Hamilton.

In 1488, James IV. with a like conſent, united and erected the eſtates and the lordſhips of Bothwell and of Crichton into the Earldom of Bothwell; and, in the ſame act of parliament, Patrick Lord Hailes was raiſed to the title and the rank of Earl of Bothwell.—Brief, p. 11. and Appen. I. —Caſe of the Earl of March.—Index to the acts of Parliament 1581, which erected the lands of Doun into a Lordſhip.

(*x*) See note (L) at the end of the volume.

ſtances, in a country not conſpicuous either for accuracy in its reaſonings or for preciſion in its laws, might eaſily lead men, neglecting to make a proper diſtinction between two ſpecies of dignities in themſelves entirely different, to imagine that the ſame irregularities, remarked to take place in the tranſmiſſion of titles annexed to fiefs, were not repugnant to the nature of thoſe which had been primarily beſtowed on perſons. The heir to whom the eſtate, the valuable object, deſcended, would naturally aſſume the appellation which had been borne by his anceſtor: No other perſon would either incline or dare to take it; and indifferent people would not reſiſt a claim in which thoſe immediately intereſted ſeemed to acquieſce. Perſonal honours, and the landed eſtates of their poſſeſſors, would thereby incorporate by degrees; and, mingling together, they would both proceed, in one courſe, to thoſe heirs, male or female, to whom the dignified eſtate deſcended. Hence, inſtead of being limited indefeaſably to males lineally ſprung from him on whom they had originally been conferred, perſonal titles, no leſs than territorial dignities, would often paſs to collateral relations, as if they had been inſignificant acceſſories of his ſucceſſion, of which they would be deemed component, if not inſeparable, particles.

From

From want of documents, it is difficult at present to distinguish those honours, which were originally personal, from such as were territorial. Hence examples, which are perfectly unequivocal, are not easy to find; and I shall not attempt to produce any. Little doubt, however, can be entertained, that, on an accurate search, the former would be found, no less than the latter, to have in fact descended before the year 1587 to heirs-female as well as to heirs-male.

In the law of Scotland it was a maxim, That, on the succession of parceners, things which are indivisible went to the eldest of the heiresses. That preference, allowed to seniority, was in some sort necessary. Territorial honours cannot, however, be accurately numbered among things incapable of division; for fiefs raised to them are partible; and it has already (*y*) been observed, that titles annexed to lands became extinct on the partition of the lands among coheiresses. But personal titles, not being susceptible of division, would naturally descend to an eldest heir-female; and I doubt not that in most cases, in which, in consequence either of a settlement or of a contract, an estate adequate to sustaining their dignity devolved to her, the title will be found also to have been borne by her. In other

(*y*) P. 184. above.

cafes women would feldom chooſe to be incumbered by a ſtate which they were unable to ſupport.

BOOK

BOOK III.

PEERAGES.

SECT. I.

Alterations made in 1587 on the Conſtitution of Parliament.

THE cruel fate experienced by James I. ſeems to have proceeded rather from the viſionary credulity and inordinate ambition of his uncle Athole, than from any violent reſentment of his general adminiſtration, or ſettled reſolution to give check to his beneficent meaſures. His innovations were magnificent, but were neither dictated by that puerile ſpecies of political

ingenuity which delights in impracticable and whimsical projects, nor marked by an excessive and imprudent novelty, which, opposing the habits and shocking the feelings of men, cannot be endured by human passions or imbecillity. A rare philanthropy, impartial justice, good taste, and superior wisdom; amiable plain vigorous principles, naturally adapted to conciliate affection and to command esteem; formed, guided, and controlled them; and his smart endeavours were not unproductive of grateful effects even on the savage hearts of his barbarians. Bowmaker, Boece, Major, Buchanan, Leslie, Drummond, Abercromby; all his historians celebrate the mighty reformation wrought, the entire security enjoyed, the happy tranquillity diffused over Scotland during his reign. The design formed against his life was an affair extremely private, in which very few conspirators were engaged: The plot, or rather the assassination, was secretly executed on him by surprise; and the piercing lamentation universally excited among his people by his murther, as well as the severe punishment solemnly inflicted, during a feeble minority, on the potent assassins who had perpetrated it (z), demonstrate, that

(z) Fordun, l. 16. c. 27. 36. — Boet. l. 17. p. 367. — Major, l. 6. c. 14. 15. — Buchanan, l. 10. c. 46. 47. 58. — Leslie, VII. 265. 267. — Hawthornden, p. 21. 45. 51. 52.

that his ſchemes and their author could not be greatly diſreliſhed or generally odious.

James had not ventured on depriving of ſeats any of thoſe who had formerly been entitled by cuſtom to ſit in Parliament. He did no more than advance a ſtep towards excluding them; and either the deſign had no ſooner been laid than it was abandoned by him, or the extreme eagerneſs with which his ſubjects took advantage of the general diſpenſation granted them in 1427, made it unneceſſary to employ much rigour in enforcing a ſtrict obſervance of the new ordinance. The counties elected not repreſentatives: The commons were not ſevered from the nobles, or formed into a chamber by themſelves: A Speaker was not choſen to preſide over them, and to expound their wants: The forms which had hitherto been uſed, continued to be obſerved, and every freeholder was ſtill underſtood to be bound as well as entitled to give attendance in the grand council of the nation. In July 1428, a few months after the diſſolution of the former convention, another Parliament was convened. In the ſummons iſſued for convoking this meeting, all who held lands of the crown, without any exception, were commanded to repair to it; and pecuniary mulcts were then impoſed on ſuch freeholders as did not obey the order, perhaps on

pretext that they belonged to ſhires which had not deputed others to repreſent them; the condition on which leave of abſence had been granted by the ſtatute paſſed in 1427 (*a*). Afterwards, during the reign of James II. an unconditional diſpenſation was granted in 1457 to all whoſe eſtates were not worth twenty pounds, that were not Barons, or who ſhould not be ſpecially required to attend (*b*). This valuation was raiſed in 1503 to a hundred marcs, and the diſpenſation then granted was allowed to Barons as well as to others, but was limited too, like the former, by a condition, that they ſhould ſend proxies to anſwer for them (*c*). The royal vaſſals, whoſe obtuſe faculties were little ſuſceptible of refined pleaſures, appear, by authentic records, to have abundantly availed themſelves of thoſe ample diſcharges which from time to time had been given them from their public ſervice, and for more than a century before the year 1587 the Scotch Parliament was very thinly attended: But the comprehenſive terms ſtill employed in the royal writs on which that convention was ſummoned, the general titles prefixed to the particular acts of each ſeſſion, and thoſe very ſtatutes which diſpenſe with their attendance, are full, and even legiſla-

(*a*) Preface to the acts of Parl. 1428.
(*b*) Parl. 1457. ch. 85. (*c*) Parl. 1503. ch. 113.

legiſlative proofs, that the obligation originally impoſed by the conſtitution was held, during the days of the Jameſes, to lie indiſcriminately on the whole tenants of the King, and that all of them, without any exception, retained, in the reign of Mary, a right to ſit in Parliament without election. Accordingly, fines ceaſed not in 1503 to be impoſed for abſence, however probable it be that they were not afterwards levied with exactneſs or rigour. From the infrequency, indeed, with which during a long period the ſmall Barons had been beheld in that aſſembly, their faces ſeem to have been almoſt totally forgotten in it; and any rare appearances unexpectedly made by them in numerous bodies, perhaps after conſiderable diſtances of time, would naturally excite ſurpriſe and even embarraſſment. Their right, however, was never relinquiſhed; and they were wont, at intervals, eſpecially on occaſions which intereſted their paſſions, to reſume their ſeats in great and formidable numbers. It is certain from ſuch of the rolls, containing liſts of the names of the members, as have been preſerved, that, after 1467, ſome Barons and freeholders were preſent in every Parliament held during the reign of James III. but their number never exceeded thirty: That a few came to the firſt Parliaments of James IV. never however more than twelve; but

but that at laſt, during the remainder of his reign, they ceaſed to come altogether: That, in the time of James V. they were very unmindful of this duty; yet two or three are ſtill found once or twice to have attended even during it: And the ſame negligence was continued during the firſt years of Mary. But, towards the middle of the ſixteenth century, from a ſympathy, always contagious, often irreſiſtible, excited by the fervent eloquence and bold ſentiments of the firſt preachers of the Reformation, by the unmerited ſeverity imprudently exerciſed by the eccleſiaſtical inquiſitors on thoſe heated innovators, and by the ſplendid intrepidity with which the dreadful puniſhment appointed by the Church for obſtinate heretics was commonly ſuſtained by thoſe primitive ſufferers, almoſt every liberal mind in Scotland had been highly inflamed into a religious indignation at that foppiſh ſyſtem, ſo oppreſſive of truth, ſo burdenſome in expence, ſo exorbitant in pretenſions, ſo tyrannical in diſcipline, which, under the impoſing name of the Catholic Religion, had maintained, during many ages, an uncontrolled and preſumptuous authority over Europe; and a mighty inundation of men, whoſe force was reſiſtleſs, poured from all corners of the country into that determined Parliament which aſſembled in Auguſt 1560, during the

the abſence of the Queen, to conſult about reforming, or rather to aboliſh and to proſcribe its ſuperſtition and its abuſes. Beſides the Nobility, the Biſhops, the Abbots, the Priors, and the Burgeſſes; Ker of Ceſsford, Maule of Panmure, Wallace of Craigie, Ker of Ferniherſt, Murray of Tullibairden, Douglas of Drumlanrig, Johnſtone of Johnſtone, Stuart of Gairlies, and many other Barons, who were not noble, but were deſcended of the firſt families, and poſſeſſed of the largeſt fortunes in the kingdom, and along with them a vaſt number of inferior freeholders, flocked to that important convention (*d*). Their great and unuſual multitude, congregated to give a deciſive weight to their reſolutions, poſſibly at firſt ſight produced aſtoniſhment, perhaps confuſion: The commons, probably on that account, before taking their places, explained, in a petition preſented to the Lords, their pretenſions to ſeats; and their right was unanimouſly admitted. This remarkable incident has eſcaped the notice of every contemporary hiſtorian; a proof, that the claim of the freeholders did not carry even the appearance of an innovation. Randolph, however, the Engliſh reſident, accuſtomed to a Parliament differently conſtituted, tranſmitted to Cecil a copy

(*d*) Keith, 146. 147.—Spotſwood, p. 149.—Parl. 1567. ch. 3. 4. 5. 6.

copy of their memorial, in which it is amuſing to obſerve them, among other topics, inſiſting, in a high tone, That ſtatutes, which they had not been required and ſuffered to reaſon and to vote at making, ſhould not bind them. "The matters," ſays he in his letter, "concluded and paſt by "common conſent on Saturday laſt, in ſuch "ſolemn ſort as the firſt day that they aſſembled, "are theſe: Firſt, That the Barons, according "to an old act of Parliament made in the time "of James I. in the year of God 1427, ſhall "have free voice in Parliament. This act paſſed "without any contradiction (*e*).

Indeed in old days all the exertions uſed were ſeldom able to procure full houſes. Perhaps among others employed in later times, on occaſions on which oppoſitions or tumults were apprehended, meaſures were to be carried, or parties were to be formed, attendance might ſometimes be invited by meſſages or ſolicited by letters. During the firſt years particularly, after James VI. had aſſumed the reins of government into his own hands, a few inſtances are found, in which ſuch invitations were ſent or requeſts were made (*f*). Throng aſſemblies however could not be obtained by thoſe gentle expedients; and official

(*e*) Robertſon, Appendix, N° 4.

(*f*) Melvil's Mem. p. 339. 367. 379.

official writs, requiring or commanding it under authority of the ſtatutes of 1457 and 1503, ſeem never to have been iſſued. At laſt, in the year 1587, a plan, in moſt articles ſimilar to the model which had been propoſed by James I. was carried into full execution. The right, which lands had formerly given to ſeats in Parliament, was then taken from them: Repreſentation was introduced: And it was eſtabliſhed, that thenceforth no commoner ſhould ſit in that aſſembly, unleſs elected a member of it. Two freeholders, of good rent and of fair character, their charges (*g*) to be defrayed by thoſe who at their expence ſhould be relieved from attendance, were ordered to be choſen annually to ſerve for each county, (except Clackmannan and Kinroſs, which were allowed to ſend only one a-piece); and the qualifications, required in the perſons entitled both to elect and to be elected commiſſioners of ſhires, were defined. The dignity of the fiefs, belonging to thoſe on whom voices and eligibility were beſtowed, was not conſidered in the affair, but the

(*g*) In 1641, their charges were fixed at five pounds Scotch, or eight ſhillings and four-pence Sterling, for each of the days which a ſeſſion laſted, and of thoſe allowed to the members, before its commencement and after its concluſion, for coming to Parliament and returning from it.—Parl. 1641. ch. 18.—Parl. 1661. ch. 35.

the value of their freeholds, and the ſuperior lord of whom their property was held. Both privileges were confined to commoners. Noblemen, not being diſcharged from the obligation under which they had hitherto lain of attending Parliament, continued ſtill bound, in conſequence of their nobility, to perform that ſervice; and, on this account, it was unneceſſary to declare them ineligible. But they were expreſsly excluded from a ſuffrage in chooſing repreſentatives of counties; and it was enacted, that every reſident freeholder, in degree inferior to a Prelate or to a Lord of Parliament, who owned lands held of the Crown and poſſeſſed of the valuation required by law (*b*), ſhould be entitled to vote in electing them. Tenements, erected into honours, were not diſtinguiſhed in this particular from others, or privileged more than thoſe inferior in denomination. Their legiſlative quality was taken indiſcriminately from all lands; and it was fixed, that noble fiefs, no more than ignoble ones, ſhould in no caſe confer independent and hereditary ſeats (*i*).

(*b*) A forty-ſhilling land.

(*i*) Parl. 1587. ch. 114.—Parl. 1597. ch. 276.—Parl. 1661. ch. 35.—Parl. 1648. ch. 2.

SECT.

SECT. II.

Effects produced on noble Honours by the alteration made on the Conſtitution of Parliament in 1587. *—Introduction of Peerages.*

IT is not impoſſible to pronounce on the motives which might induce James I. to alter the conſtitution, to extend the deliberations, to lengthen the ſeſſions, and to increaſe the frequency of Parliament. An ingenuous able patriotic poliſhed prince, who compaſſionated the miſerable condition of his poor commons, who was eager to ſubdue the unruly tyrants that lorded over them, and who was ſolicitous to civilize both, would wiſh to give regularity, vigour, dignity, and reſpect to government: And if principles alike generous ſhall be ſuppoſed to have engaged James VI. to adopt a meaſure which had been approved by the wiſdom of his predeceſſors, a compliment, neither contradicted by the hiſtory (*k*), nor diſavowed in the preamble of the ſtatute which eſtabliſhed it, will be paid to his heart, without any impeachment of his under-

(*k*) Spotſwood, p. 366.

derſtanding. But thoſe who, amidſt a vain affectation of uncommon depth, inſiſt that, deprived, in conſequence of the Reformation, of the valuable ſupport which in former times the Crown had derived from the ſpiritual eſtate, his only view in introducing the ſmall barons into permanent ſeats was to reinforce the royal influence in parliament againſt the increaſed power of the Nobles; at the ſame time that they betray great ignorance of the real ſtate of landed property in Scotland, inſpire alſo, amidſt a contrary intention, a mean idea of James's political diſcernment; and even leſſen any favourable ſentiments, which otherwiſe might be formed, of the kind affections entertained by him towards that numerous body which a humane man will readily allow, from their hard lot, to poſſeſs a primary claim, in every nation, to ſympathy, to indulgence, and to protection. Before the Reformation the Popiſh clergy, in conſequence of the engagements contracted by them at being inveſted with the ſacred character, owed canonical obedience to the ſupreme ruler of the Church; a foreign potentate, reſident in a diſtant country, and different from the chief governor of their own: The Sovereign, as well as the protector, of every individual belonging to his order, perhaps a firmer allegiance was preſerved by the dig-

dignitaries to that univerſal biſhop, with whom they were more cloſely connected by a direct ſubordination, than by their inferiors, who were immediately ſubjected to their proper Ordinaries. Thoſe raiſed to prelacies not only regarded with a fond admiration the ſublime tiara, whoſe irradiations reflected much luſtre on their mitres, but looked continually to the Roman Pontiff for richer ſees, red hats, Papal commiſſions, legantine powers, and other (*l*) favours; and, in conſequence of the profound veneration in which the infallible Father was held all over the Chriſtian world, preferments might eaſily be either forwarded or obſtructed by his high interpoſition, even in caſes in which his apoſtolic office did not entitle him directly to interfere. The Scotch Kings claimed, and, after ſome ſtruggle, I believe at laſt obtained, a right of nominating to the vacant biſhoprics in their dominions. But their right was not in itſelf perfect. Their nomination, beſides being controllable by forms, was required ultimately to be confirmed by the Holy See, without whoſe approbation and even authority inveſtiture and conſecration could not follow upon it (*m*). Abbotſhips, too, and Priorſhips, inſtead

(*l*) Parl. 1424. ch. 28.

(*m*) Fordun, l. 4. c. 44. l. 6. c. 35. ſqq. 46. l. 10. c. 28. —Parl. 1483. ch. 111.—Parl. 1493. ch. 64.—Parl. 1540. ch. 100. 102.—Rymer, II. 816.—Spotſwood, p. 100.

of being at the Royal diſpoſal, were commonly conferred either by their proper monaſteries or by private patrons; and it appears not to have been uncommon of old to make application at the court of Rome for benefices diſpoſable as well as ſituated in Scotland (*n*). Hence, inſtead of being ſervilely devoted, the dignified clergy, all over Europe, often created or fomented, before the Reformation, violent oppoſitions to their native Sovereigns (*o*): And it is only ſince their promotion became entirely dependent on the crown, that they can form juſt pretenſions to that humility and that diffidence with which men, high in rank and independent in fortune, are ſometimes obſerved, in public life, to reſign their underſtandings and their voices to the fuller information and ſuperior wiſdom of adminiſtration and of favourites.

It could not therefore be to repair the loſs of a ſupport, on which neither himſelf nor his predeceſſors could rely with aſſurance, that James revived the law which had been paſſed in 1427. The Proteſtant biſhops, rendered by the new eſta-

(*n*) Parl. 1427. ch. 119. — Parl. 1471. ch. 54.——Parl. 1481. ch. 103. 104.——Parl. 1483. ch. 107. 111.——Parl. 1493. ch. 63. 64. 65. 66. 67.—Parl. 1496. ch. 86. — Parl. 1540. ch. 100.—Hawthornden, p. 121.

(*o*) Buchanan, l. 10. c. 38.—Melvil's Mem. p. 6.

eſtabliſhment more dependent than the Popiſh prelates had been, ſtill repreſented one of the three eſtates in Parliament (*p*): And if the Royal influence had on the ſudden ſuffered a conſiderable diminution from the reduced number and decreaſed weight of the ſpiritual members, a wiſe miniſter would never have attempted, to preſerve or to recover it by a reinforcement of unlettered and turbulent Barons. Among the commons many individuals were found, whoſe eſtates were as extenſive, and whoſe followers were as numerous, as thoſe almoſt of any nobleman in the kingdom; and more diſturbance had never been created to the King, greater violences had never been committed in the country, by the nobles, than had often been excited by commoners, who indeed will generally be found to have borne a principal part in all the outrages of their times. After the new model was eſtabliſhed, the ſmall freeholders would not incline to be ſubjected by election to a burden, from which, on account of its grievouſneſs, they had lately ſolicited to be relieved; and if any of them ſhould be ambitious of that honour, now rendered precious by its rarity, they could hardly entertain any hopes of arriving at it. The ſervice of attending parliament would be devolved, all over

(*p*) Parl. 1584. ch. 3. 20. 5.—Parl. 1587. ch. 29.

the country, on perſons whoſe fortunes were adequate to the expence of it, who would be little connected even by approximation with the crown, and who would in all probability prove exceedingly unmanageable, as their number rather exceeded, their conſequence was ſcarcely leſs, and their pretenſions would not be inferior to thoſe of the nobles. The chief employments of ſtate had always been conferred indiſcriminately on both orders. During the minority of James II. Sir Alexander Livingſton was appointed, by a convention of eſtates, Governor over all the realm; and Sir William Crichton was approved by them Chancellor of the kingdom (*q*): Both this office and that of Secretary were in 1587 enjoyed by Maitland, a commoner, who had alſo held the Privy Seal immediately before the cuſtody of it was given to the famous poet George Buchanan: His elder brother, the Maitland of Lethington, ſo highly celebrated by all the writers of his age, had been principal Secretary under Queen Mary. James, therefore, by obliging a conſiderable number of the wealthieſt freeholders to attend regularly in parliament, was only bringing on himſelf an additional number of importunate ſuitors, whoſe avidity it ſhould not be in his power to ſatisfy; and, at the

(*q*) Pitſcottie, p. 4.—Hawthornden, p. 55.

the taking of this ſtep, it muſt have been apparent to his counſellors, that he could not depend on them for any effectual ſupport againſt the ariſtocratical influence of the nobility. Conſequences, in themſelves evident, could not eſcape the diſcerning ſpirits of thoſe times. The firſt miniſter, Maitland, a penetrating genius, would unqueſtionably deſcry them. It is well authenticated, that the meaſure was ſupported by the commons, but oppoſed by the nobles; and, as the collective authority of the latter order was extremely feeble, compared with the united force of the former, the Barons would neither have approved of the alteration, nor have ſuffered it to paſs into a ſtatute, had they apprehended it to be derogatory to their dignity.

In thoſe days men were exceedingly ignorant of ſome advantages, to which experience has taught their enlightened poſterity, that ſeats in Parliament may be converted. The ſmall freeholders, in conſenting to the law, imagined that they were obtaining a diſcharge from a burthenſome and unprofitable ſervice. The rich Barons, who were able to bear the expence, foreſaw, that, in conſequence of the ſeats to which they were generally ſure of being elected, they might be conſiderably diſtinguiſhed above their rank, and, if not ſet entirely on a level, ſhould at leaſt be

approached nearer to their ſuperiors. The nobility did not reliſh an indulgence, which was not extended to their body; and knowing that, as long as the doors ſhould remain open to every perſon who wiſhed to enter them, the Houſe would ſeldom be crowded, but that numbers and wealth would give the phalanx which was going to be introduced much weight, apprehended that their influence or dignity ſhould conſequentially be diminiſhed. And the crown, which, not being provided with any regular force immediately dependent on the King, ſeems always in Scotland to have peculiarly dreaded mighty convocations of people; at the ſame time that authority was acquired to Parliament, and that regularity was introduced into government, expected, by fixing the number of repreſentatives of counties, to be ſecured againſt thoſe tumultuous meetings cauſed by inundations, ſuch as had been made at the firſt eſtabliſhment of the reformed religion in the year 1560. It would, perhaps, be an exceſſive refinement to ſuppoſe, that James's miniſters foreſaw, (for at that early period of life James himſelf could ſcarcely foretell), that the nobility, diſcovering themſelves to be more cloſely connected by the new conſtitution with the Sovereign than any other order of the nation, would ſpeedily become more devoted to the crown than they had been

been during the former period. Probably the remote consequences, which should ultimately follow from that ordinance, were not fully perceived by all the members affected by them; but assuredly many of them would be foreseen by several both of the commonalty and of the quality; and those, who would penetrate the views which James's council had in establishing representation, must look to the effects which were actually produced by it.

First. After the year 1587 honours passed not on the alienation of the lands which had been raised to them, along with the fiefs, from the former owners to the new acquirers. A commoner, on purchasing, or even on succeeding to an estate erected either into an earldom or into any other dignity, did not become noble, or acquire an inelective right to sit in parliament (*r*). He acquired, however, a title to be chosen, and to vote in chooſing a representative of his county: And that was all he acquired.

Secondly. Lands belonging to commoners, on being formed either into lordships or into higher appellations, altered not the rank of their proprietors, and did not give them either titles or seats. Their owners remained entitled to sit only

(*r*) Fountainhall's Decisions, 23 January 1706, Earl of Sutherland v. Earl of Crawford.

on election: And another act, bestowing both upon them, or creating them Peers, was necessary to confer that high and independent privilege (*s*).

Thirdly. A Peer, on alienating or losing either the whole or a part of his estate, noble or ignoble, did not lose his nobility, but continued, notwithstanding that alteration in his circumstances, both to possess his dignity and to sit in the national council.

In 1587, all honours were rendered personal,

Fourthly. Lands, either which belonged to noblemen at the time of their creation, or which were acquired by them after it, were not thereby affected in denomination. A barony, belonging to a person who was created an Earl, did not become an earldom; but a further and a different act, erecting fiefs into honours, was required to render them noble.

The year 1587, therefore, is a grand æra in the parliamentary history of Scotland. The hereditary inelective seats which the Lords, excepted by statute from the innovation then made on the constitution, had alone been permitted to retain, were rendered absolutely independent of lands. The noble honour, or rather the high privilege, which formerly had often been united to fiefs, was entirely disjoined from them; and as

(*s*) Parl. 1592. ch. 121.

as dignities, diſannexed from lands, muſt be perſonal, all nobility was tranſmuted, in conſequence of this disjunction, into ſtates or qualities of the perſons merely of thoſe who inherited or were elevated by it.

and tranſformed into proper peerages,

Its nature, too, or the rights implied in it, were eſſentially affected by that alteration. Till 1587 honours, both the perſonal and the territorial, had been no more than a tinſelled ſpecies of private property, ſtyles, to wit, or titles, which implied rank or precedency: But they were then transformed, from empty names and vain appellations, into parliamentary dignities and important ſtations of public truſt, which veſted exluſively in the individuals diſtinguiſhed by them a right, independent of property and diſconnected from it, to ſit in Parliament without election.

The nobility were not indeed erected then into a ſeparate eſtate, yet were in ſome ſort formed into a diviſion by themſelves. Particular delegates, choſen out of their own claſs, were thenceforward named for them on the committee of articles: different repreſentatives were put on it out among the inferior freeholders: And the perſons choſen out of each body were regularly marked in the records diſtinctly from thoſe nominated out of the other.

Thus, in 1587, a ſuperior order, hitherto unknown

known in the conſtitution, was inſtituted in North Britain. During the preceding period every freeholder, conſidered in his legiſlative capacity, no leſs than every nobleman, had in effect been a ſpecies of Peer, or rather the eminent dignities properly termed Peerages had not been introduced into Scotland: But in that year thoſe poſſeſſed of nobility were elevated into hereditary lawgivers, and born counſellors of the people and of the Crown in the high court of Parliament, or were created juſt and proper Peers, in the ſenſe in which the word is now underſtood; and the lofty privilege, for which this ſtate is chiefly valued at preſent, was then rendered peculiar to their exalted degree.

SECT. III.

After 1587, *Peerages were Eſtates not deviſeable, but ſtrictly entailed.*

ſtrictly entailed,

THIS grand alteration could not but be productive of important conſequences on the legal deſcent, as well as the eſſential nature, of honours. Thoſe annexed to fiefs might ancient-

ly

ly have been transferred by deed, and deviſed by their owners: Few perſonal dignities ſeem to have exiſted in Scotland before the year 1587; and on this account, as well as from their inferior value (*t*), perhaps more than from analogy, which here is very imperfect, a like power was ſuffered ſometimes to be exerciſed over them alſo: But in 1587 all noble honours, having become parliamentary dignities and legiſlative truſts, ceaſed to be transferable or deviſable (*u*). The laws, therefore, by which their deſcent had been governed in former times, could no longer be applied to them: A new ſyſtem, in material articles different from the old, was required or introduced to regulate their ſucceſſion; and the rules which compoſe it can be rightly derived only from the new nature acquired by them in that year, or be referred for their commencement and for its conſequences to that epoch.

Lands and honours, which in ancient times had often been incorporated, were formed, in 1587, into eſtates entirely different from each other; and theſe dignities, inſtead of acceſſory, ſubordinate, or hanging on others, were then rendered rights, in themſelves principal, ſovereign, and

(*t*) L. 21. ff. de reg. jur.

(*u*) Durie's Deciſions, 11th July 1633, Oliphant v. Oliphant.

and distinct, which had elevated privileges depending wholly on themselves. The descent of Peerages, therefore, could no longer be influenced by that of any fiefs belonging either to those possessed of them or to others (*x*); and as they were rights in their nature too precious, and in their object too high, to be in the disposal of the private persons who enjoyed them, Peerages became, in 1587, a sort of estate strictly entailed, neither attachable by creditors, nor acquirable by purchasers, nor disposable by their possessors, but descendible only to those appointed to succeed to them at common law, in the ordinary course of that species of inheritance.

The disability, under which their possessors were then laid to dispose of them, extended to persons descended of the blood which had originally been ennobled, as well as to aliens from it. The right of those called to inherit them was indefeasable; and their succession could not be frustrated by the arbitrary act of any of their anterior lords. Each heir, on his existence, had in himself an estate, which in his turn he was entitled to obtain,

Jan. 25. 1706. (*x*) In 1706 the Court of Session adjudged, that the dignity of John Sutherland, Earl of Sutherland, did not appear to have been conveyed to his sister Lady Elisabeth, who in 1514 had succeeded him in the earldom or estate! See sect. viii. below.

obtain, independent of the will of his anceſtors, in conſequence of the grant underſtood to have been made by the Crown directly in his favour: No form, not even the verdict of a jury aſcertaining his lineage, was required to veſt it in him: And by aſſuming the honours, he did not become anſwerable for any debt of his predeceſſor (*y*), becauſe after 1587 Peerages were deemed emanations derived entirely from the royal pleaſure, not proper parts of his inheritable fortune, and of courſe on his death devolved not to his ſucceſſor from his will declared or implied, but, amidſt the ſucceſſive changes in their immediate poſſeſſors, as well as at their original creation, were held to come to every perſon, who took them, ſolely by the gift of Majeſty (*z*).

For example: A Peer, who held an ancient Earldom in fee ſimple, and who had ſeveral children, might, after 1587, ſettle his eſtate either on a younger ſon, on a daughter, or on any ſeries of heirs agreeable to his inclination; and the perſon, called by that ſettlement to ſucceed, might take the lands deviſed under it, with the proprietary

(*y*) Macdouall, B. 1. t. 2. § 32: B. 3. t. 6. §. 25.—— Erſkine, B. 3. t. 8. § 86.—Erſkine's Deciſions, 25th March 1622, Lord Semple v. Hay.—Harcarſe's Deciſions, 31.

(*z*) See B. 3. ſect. 8. near the end; and B. 4. Obſerv. V. and XXX.

tary jurisdiction and the feudal privileges annexed to them: He would not, however, on succeeding to the noble fief, obtain the dignity which had anciently been united to it, but would still remain a commoner, and might even be entitled, on the Earldom itself, both to be elected and to vote in electing a member of the Parliament of Scotland, or of the House of Commons. The eldest son, too, or the natural heir, might thereby be excluded from a substantial part of his expected inheritance, but could not be deprived of the Peerage: Though stripped of his patrimony, he would retain his distinguishing prerogative, either to sit in the Scotch Parliament without election, or to vote in chooſing and to be himself chosen one of the noblemen, eligible by the treaty of union, to represent the Scotch Peers in the Parliament of Great Britain. A similar settlement, in like circumstances, would have had very different effects before the year 1587; a clear proof of the mighty change produced by the statute then enacted.

SECT.

SECT. IV.

After 1587, *Peerages were descendible only to Heirs-male.*

THE new course, in which honours were caused by that act to descend, would take a direction conformable to the nature then assumed by them: And a feminine possession, held before 1587, of any dignity, especially a territorial dignity, probably will now be confessed to be totally insufficient to establish that the Peerage either is at present, or since 1587 has been, feminine; because, during the preceding period, every noble title, derived from the feudal denomination of a dignified fief, was descendible to heirs general. and descendible only to heirs-male.

A plain person, who reflects on the capital right implied in them, will readily pronounce that dignities, whose essence consists in conferring inelective seats in a legislative assembly of which men are alone permitted to be members, must be intended only for males: Grants, either couched in expressions that are not in themselves determinate, or whose terms, not being reduced into wri-

writing, can only be gathered by imagination from conjecture, ought to be explained in a ſenſe agreeable to their object. In every country, even in ſuch whoſe inhabitants are moſt paſſionately attached to liberty, and in which their natural equality or independence has been moſt extenſively recognized by the ſupreme power in the diſtincteſt terms, women are conſtantly found excluded from the public ſenates of the ſtate; the congreſſes of America and the wittenagemots of England, no leſs than the comitia of Rome and the conventions of Athens. A general principle, older than any record, without any perceivable reſiſtence proceeding from the powerful party immediately intereſted to diſpute its juſtice, ſeems thence to have been ſilently introduced into civil ſociety, and now to be firmly eſtabliſhed in the political creeds of all nations: And this maxim, from its high antiquity or perfect familiarity, commands an eaſy and unſuſpicious aſſent even in regions, in which mankind are acknowledged by the conſtitution of their government to have rights, and the hands of females are not ſuppoſed from long cuſtom to be too delicate or too feeble to ſuſtain the ſceptre and the weight of royalty. The fact is inconteſtable: But thoughtful inquirers may puſh their reſearches farther; and, from a philoſophical curioſity always laudable as

well as entirely harmleſs, will perhaps be inclined to examine the foundation of an inſtitution, in itſelf ſo remarkable, by which an equal half of human kind are not admitted to any formal ſhare in conſultations held about meaſures, by which their conduct muſt be governed, their property is affected, and their liberty is reſtrained. Some natural views muſt undoubtedly have led to its firſt eſtabliſhment, and muſt alſo have obtained the acquieſcence, ſo patient and ſo univerſal, which has been gained to it. Thoſe who, to account for the excluſion of females, aſſert, that from Nature the apprehenſions of women are not equally quick, that their fancies are not equally lively, that their judgements are not equally correct, that their hearts are not equally benevolent, and that, with like advantages, their ſentiments would not be equally juſt as thoſe of the men, cannot have been fortunate in their acquaintance, or, perhaps, their underſtandings are limited by an aſtringent narrow conceited pedantry. But—without a ſeverity of ſtudy, a fulneſs of knowledge, and an intenſeneſs of thought, of which the offices females are pleaſed, as well as deſtined to perform, ſeem ſcarcely to admit, diſtinct and enlarged opinions cannot be attained on the involved and thorny matters which muſt be diſcuſſed in national councils: The courſe of education,

which, being ſuppoſed moſt adapted to qualify for diſcharging thoſe functions, has generally been reckoned proper for the ſex, is little ſuited to the perfect attainment of thoſe clear and accurate conceptions: The habits as well as notions of life, which thence are commonly contracted by women, tend rather to create in them an indiſpoſition, than to excite a paſſion towards political labour and diſquiſitions: And duties, eſſential to the preſervation of ſociety, oblige them at times to avoid expoſing their perſons to hazard, or diſable them to endure fatigue, and to ſtir from home. The unembarraſſed confidence, too, acquired by frequent appearances in crowded theatres, the intemperate agitations into which public ſpeakers are often thrown, and even the maſculine faculty of delivering long orations with force or with compoſure in a mixed aſſembly, might wholly diveſt them of thoſe principal charms; modeſty, ſoftneſs, delicacy; which contribute ſo powerfully towards inſpiring love and preſerving affection. Their preſence, alſo, ſhould engage the attention of the men from other objects, to a contemplation of their beauty; and places at which the ſexes ſhould intermingle, inſtead of grave conventions for the ſerious diſcuſſion of intereſting buſineſs, might degenerate into ſcenes of frivoloufneſs, of gallantry, and even of

corrup-

corruption: Or the keen contentions, ever ready to ariſe among ſpirits ſtimulated with ambition, might ſometimes be inflamed between them into unnatural, but pointed oppoſitions, inimical to that intenſe and enthuſiaſtic, yet ſweet and tender paſſion, whoſe fond devoted anxious ſentiments conſtitute the pureſt and the higheſt delight of every warm ingenuous elegant mind. On theſe pretexts, or perhaps by the ſtrength and the arrogance of the men, females have been excluded in moſt nations from taking any part, either deliberative or deciſive, in meetings held to conſult about general laws; and in Scotland, votes in theſe aſſemblies have always been confined to males. The Peerages, therefore, which, for thoſe ſole purpoſes, were created in 1587 out of the noble honours anterior to that year, muſt now be deſcendible to men only, by whom the illuſtrious privilege implied in that elevated condition is alone exerciſable; and, agreeably to the ſtrict interpretation put by law on all patents by which high public truſts are conferred, theſe maſculine fiefs muſt be limited to heirs-male, for whom alone they can be preſumed to have then been intended (*a*).

Hugh Lord Fraſer of Lovat died in 1697 without

(*a*) Fountainhall's Deciſions, 23 Jan. 1706, Earl of Sutherland v. Earl of Crawfurd.

out male iſſue; and, on his death, the title of Lady Fraſer of Lovat was aſſumed by his eldeſt daughter, Æmilia Fraſer. Simon Fraſer of Beaufort, grandſon of her great-great-grandfather, the Lord Fraſer of Lovat who had died in 1646, was heir-male of that family, and in this character claimed, in the Court of Seſſion, the honours from her ſon, Hugh Mackenzie of Fraſerdale, the heir general, who, after his mother's death, had taken poſſeſſion of them. The pretenſions of both parties were not leſs ably maintained by their counſel, than attentively examined by the judges in Scotland: The learned papers, written in that intereſting ſuit, are the principal ſource of the whole erudition, which after minuter reſearches has been more pompouſly, and perhaps more correctly, diſplayed in ſubſequent caſes: And in 1730 that ſupreme court, after a full and accurate inveſtigation, pronounced a deciſive judgement, on general principles, in favour of the heir-male (*b*). In that judgement Mr Mackenzie acquieſced:

July 3. 1730.

(*b*) The court declared "the title, dignity, and honours "of Lord Fraſer of Lovat, to pertain and belong to "the ſaid Simon Lord Fraſer of Lovat, purſuer, as el- "deſt lawful ſon of Thomas Lord Fraſer of Lovat, his fa- "ther, who was grand-uncle to Hugh Lord Fraſer of Lo- "vat, deceaſed, father of the ſaid Mrs Æmilia Fraſer, and "grandfather of the ſaid Hugh Mackenzie, defender, and, confe-

acquieſced: Simon Lord Fraſer of Lovat poſſeſſed the Peerage during his life, and his right was recognized by all the branches of the Britiſh legiſlature. In 1746, under the title of Lord Lovat, articles of impeachment were exhibited againſt him by the Houſe of Commons, for acceſſion to the rebellion then raiſed againſt his Majeſty George II. He was tried by the Houſe of Lords as a Peer. Lord Hardwicke, the excellent Chancellor, was created by the Sovereign Lord High Steward to preſide at that trial; remarkable, beſides other things, for affording us, alas, almoſt the only genuine monument of thoſe vaſt powers, of which but a feeble conception can be formed even from that admirable diſcourſe (*c*): And on Lovat's conviction, the cruel puniſhment, which his Lordſhip had been condemned to ſuffer, was commuted by the mercy of the Crown into decollation; a diſtinction commonly granted to nobility.

" conſequently, as heir-male of the family of Lord Fraſer " of Lovat, to whom the ſaid title and dignity does de- " ſcend."—Sup. Caſe, p. 19.—Ad. Caſe, ch. 6. p. 95.—Brief, p. 39.

(*c*) Lord Lovat's Trial, p. 165.

SECT. V.

After 1587, *Peerages were limited to Heirs-male of the Body of the Perſon firſt ennobled.*

Of the body of the perſon firſt ennobled.

PERSONAL Honours, not ſaleable for money, nor attachable for debt, nor deviſable by the individuals who held them, but appointed to deſcend in an unalterable courſe, muſt neceſſarily be annexed to blood. In 1587, the pretenſions which any perſon could form to them were made to depend entirely on lineage, and blood became the only canal by which they were tranſmiſſible from one poſſeſſor to another. The blood required to convey them could not be any ſpecies, however poor or mean, of that fluid. A ſort richer than ordinary could alone poſſeſs fineneſs ſufficient for a vehicle employed to carry or to ſuſtain nobility. Blood connected directly with the dignity, or which eſtabliſhed in the claimant an immediate connection with the former poſſeſſors of it, could alone perform that office. The blood of a man who was not ſprung from them, not being a ſtream of that which had iſſued from their hearts, nor differing in purity from the gore of

of the vulgar, could not give a claim to their honour. Noble blood was required to conſtitute nobility; and a perſon, in whoſe body none of that ſublimated kind flowed, could not be a nobleman by deſcent. Forgive me, my Lord: Juriſprudence, whoſe primary aſſumptions a philoſophical inquirer will often diſcover not to differ materially from the crude ſentiments of the mob, muſt ſometimes deſcend from its accuracy, and, in adopting the inſolent language, may ſeem alſo to approve of the nonſenſical ideas of pride and of folly. After 1587, every man who claimed a Peerage by inheritance was obliged to be deſcended either immediately or mediately of the perſon on whom that dignity had originally been conferred; otherwiſe plebeian blood alone ran in his veins, and his birth could not be noble. In that year, therefore, thoſe perſonal Peerages, into which the ancient honours had all been tranſmuted, became deſcendible only in the right line, and were limited to heirs-male ſprung from the perſon firſt ennobled. His kinſmen, his brothers, his parents, had not been nobilitated; and without expreſs words a nomination, made by the King in his Royal capacity, to a ſtation high in rank, in its nature public, and important to the ſtate, which without great impropriety may be termed a truſt or an office, cannot be extended

either to aſcendants or to collaterals, into whom his blood can never paſs.

I pretend not that no inſtance can be produced, in which, after 1587, noble honours deſcended to heirs general; but am perſuaded that, for one example in which they went to heirs-female, three will be found in which they devolved to heirs-male (*d*): A tolerable proof of the eſtabliſhed rule. It even began then to be common for noblemen, who foreſaw that, in conſequence of the alteration made on the condition of nobility, their eſtates and their titles might afterwards go to different perſons, to alter ſettlements by which their lands ſtood deviſed to heirs-female, and to ſettle them on heirs-male.

A like precaution was not infrequently uſed in the caſe of Peerages. Before the Union, Peers, who perceived that the male deſcendants of the anceſtor firſt ennobled in their family were about to become extinct, were wont to reſign their dignities to the Crown, and to obtain new charters appointing them to go to collateral males, or perhaps to heirs general; a proof, that without thoſe new grants extending the courſe of their ſucceſſion, honours were held after 1587 not to be deſcendible to either (*e*). Accordingly,

(*d*) See note (M) at the end of the volume.

(*e*) Fountainhall's Deciſions, 23d Jan. 1706, Earl of Sutherland v. Earl of Crawfurd.

cordingly, Peerages were underſtood then to extinguiſh on the failure of heirs-male of his body; and on looking into the report made in 1740 by the Court of Seſſion to the Houſe of Lords, or even into the books of genealogy, your Lordſhip will diſcover many, which ceaſed in the laſt century to be claimed by collateral males as well as by heirs-female, who ſhould otherwiſe have had a right to them. Apprehended extinction was one principal view which produced the reſignations that became continually more frequent, as errors were gradually corrected, as objects came to be accurately diſcriminated, and as time approached nearer to the Union: And we muſt not conclude or even preſume in any caſes in which collateral males aſſumed poſſeſſion, either that their right is indiſputable, or that they were not admitted in conſequence of expreſs words contained either in original patents or in new grants proceeding from Majeſty.

John Stewart Earl of Athole, to whoſe great-great-grandfather that Earldom had been granted by his brother James II. (*f*), died in 1594 without male iſſue; but he left four daughters. The Peerage, however, did not deſcend to any of them: It became extinct. Dorothea, his eldeſt daughter, married William Murray Earl of Athole.

(*f*) Major, l. 6. c. 15.—See p. 204. above.

of Tullibairden: Mary, the ſecond daughter, married James Stewart, eldeſt ſon of John Lord Innermeath: And, in 1595, John Lord Innermeath was created Earl of Athole by James VI. who beſtowed on him a grant of the eſtate, both lands and dignity, limited to John the original patentee, and to the heirs-male of his body. The Peerage was accordingly enjoyed by him during his life, and from him deſcended to his ſon James; but, on James's death without iſſue, becoming again extinct, John Murray Earl of Tullibairden was created Earl of Athole by Charles I. in 1629 (*g*).

Lindſay of the Byres.

The Lordſhip of the Byres belonged to a family, remarkable in early times for the fervour of their zeal about the reformation of religion, for the warmth of their attachment to every image of liberty, and for the ſteadineſs of their adherence to all thoſe meaſures which they ſuppoſed would promote them. John Lindſay, Lord Lindſay of the Byres, died in 1608 without male iſſue, and on his death the Peerage devolved not to

(*g*) Lovat's Anſwers, p. 6.—Mackenzie's Inf. p. 21. and his Cond. p. 4.—Lovat's Remarks, p. 15.—Charter, 6th March 1595. (B. 61. N° 19.)—Charter, 17th Feb. 1629. (B. 52. N° 89.)—Sup. Caſe, p. 19.—Ad. Caſe, ch. 6. p. 104.—Brief, p. 123.

to his daughter Anne, but to his brother Robert (*b*).

In 1640, Robert Boyd Lord Boyd, a man learned, accompliſhed, and elegant above his age, died without iſſue; but he left five ſiſters, whoſe deſcendants ſtill exiſt, and are numerous. The Peerage, however, went to his uncle James Boyd, and remained with the heirs-male of his body till William Earl of Kilmarnock was attainted of high treaſon in 1746 (*i*). Boyd.

In 1581, the Earldom of Lennox was erected by James VI. into a Dukedom, in favour of Eſme Stewart Earl of Lennox, a near kinſman as well as great favourite of that King. His great-grandſon, Eſme Duke of Lennox, died in 1660 without iſſue, and on his death that Peerage deſcended not to his ſiſter Lady Mary Stewart, who was both a grandchild of the famous Villiers Duke of Buckingham, and married to the eldeſt ſon of the firſt Duke of Ormond, but to his couſin Charles Earl of Litchfield. On the death of Charles Duke of Lennox without iſſue in 1672, the dignity Lennox.

(*b*) Sup. Caſe, p. 18. 29.—Ad. Caſe, ch. 6. p. 92.—Brief, p. 130.—Lovat's Mem. p. 10.—His State of Inſtances, p. 4.—Mackenzie's Anſwers, p. 11.

(*i*) Mem. for Lord Lovat, p. 15.—Mackenzie's Anſwers to it, p. 16.—Lovat's State of Inſtances, p. 7.—Sup. Caſe, p. 17.—Ad. Caſe, ch. 6. p. 93.—Brief, p. 132.

nity went not to his sister Lady Catherine Stewart wife of Lord Obrien, but merged by descent in the Crown (*k*).

Murray. James Stewart Lord Doun, eldest son of Alexander Earl of Murray, one of the principal Secretaries of State during the reign of James VII. died before his father, leaving two daughters; Elisabeth, who did not leave children; and Æmilia, whose descendants are still in being. The Peerage however, on the death of Alexander, devolved not to either of them, but went to Charles Stewart their uncle, and on his death without issue, to his brother Francis Stewart, whose grandson is now Earl of Murray: A striking example, compared with an instance formerly cited, in which this identical title descended before 1587 to the eldest daughter of the regent (*l*).

Forbes. Francis Forbes Lord Forbes, who in 1730 had succeeded his father William Lord Forbes, died during his nonage in 1734 without issue; but had two sisters, Jean-Maria and Elisabeth, who survived him, who were both married, and whose children still exist. The Peerage, instead of descending

(*k*) Lovat's Ad. Cond. p. 20.—Sup. Case, p. 26.—Ad. Case, ch. 6. p. 112.—Brief, p. 137.—Stair, B. 2. t. 4. § 2.

(*l*) Lovat's Ad. Cond. p. 13.—Sup. Case, p. 20.—Ad. Case, ch. 6. p. 107.——Brief, p. 137.——Compare p. 171. 172.

ſcending to any of his ſiſters, went to his uncle James Lord Forbes, father of the preſent Lord.

John Lindſay, the gallant Earl of Crawford, whoſe elegant manners are ſtill remembered by many, died in 1749 without iſſue; but was ſurvived by two ſiſters, Catherine and Mary, of whom, Mary has children. The Peerage however deſcended to his heir-male, a diſtant couſin, George Lindſay Viſcount of Garnock, whoſe ſon is now Earl of Crawford. Crawford.

The money, owing in the laſt century by the Earl of Caithneſs, amounted to more than a million of marcs; an amazing ſum in that remote county, in which a fowl is ſtill ſold for threepence. On the Earl's death in 1676, Campbell of Glenorchy laid claim both to the honours and to the eſtate of that family under a conveyance, a charter, and a ſeiſin, by which, in conſequence of a tranſaction concluded between them about ſatisfying the creditors, the Peerage as well as the Earldom had been made over to him. Campbell's pretenſions were obliged in thoſe diſorderly times to be maintained by force of arms againſt the clan of the Sinclairs, who were generally attached to the lineal heir of the ancient proprietors: Glenorchy had furniſhed ſeventeen hundred men to that ſavage hoſt, which, in 1678, was detach- Caithneſs.

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ed by a violent adminiſtration to lay waſte the peaceful habitations of the harmleſs enthuſiaſts in the weſtern ſhires of Scotland (*m*): And, to aſſert his property, his followers, reinforced by a company of Highlanders in the pay of government, having marched from the Banks of the Tay beyond the extremity of Sutherland and the promontory of the Ord, a battle, ſtill celebrated in Breadalbane and in Caithneſs, was fought in 1680 at Oldimarlack, in which victory declared in favour of the Campbells, and they obtained peaceable poſſeſſion of the lands, to which their pretences were ſeemingly unqueſtionable (*n*). Moſt of the gentlemen, at preſent poſſeſſed of any parts of that Earldom, derive their right from Glenorchy, by whom too the title was aſſumed. But the Privy Council (*o*), under authority of a reference made to it by parliament (*p*), found that George Sinclair, heir-male of the laſt Earl, had a right to the dignity. On his death without iſſue in 1698, the Peerage devolved not to his ſiſter Jane Sinclair, but to John Sinclair of Murkle, a

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(*m*) Burnet, ii. p. 184. on year 1678.—Hume, ch. 66.

(*n*) Papers and proof in a cauſe brought in the Court of Seſſion about 1748, the Hon. Francis Sinclair v. George Sinclair of Ulbſter.

(*o*) Fountainhall, i. 115. 148.

(*p*) Index to the acts of Parl. 1681.

distant heir-male, from whom it was transmitted to Alexander his eldest son (*q*). In 1765, Alexander Earl of Caithness died, leaving an only child, Dorothea, wife of James Earl Fife; and his landed estate, in consequence of a settlement which had been executed by him, went to another family. Neither the Countess of Fife, nor the owner of the lands, even entered a claim to the Peerage, but it was adjudged by the House of Lords in 1772 to have descended to the heir-male, William Sinclair of Rattar, whose son is now Earl of Caithness: Precedents, if compared with a former (*r*) brought from the same house, demonstrative both of the great alteration made in 1587 on the laws of succession to honours, and of the total disconnection then effected between them and lands.

In 1651 the dignity of Viscount of Oxfurd and Lord Makgill of Cousland was conferred by Charles II. on a Lord of Session, Sir James Makgill, to him and his heirs-male of tailzie and provision whatsoever. Sir James, on his death in 1663, was succeeded by his son Robert Makgill, who in 1689 sat in the convention of the estates of Oxfurd.

(*q*) Case of William Sinclair of Rattar, exhibited to the House of Lords in 1772, on his claim to the Peerage of Caithness.

(*r*) P. 211. above.

of Scotland, but died in 1705 without male iſſue, leaving two daughters, Chriſtian and Henrietta. Chriſtian Makgill married William Maitland, and their ſon was Robert Maitland. After the death of Robert Makgill, the ſecond Viſcount, the Peerage was not claimed till 1733, that James Makgill of Rankeillor, heir-male of the patentee, entered pretenſions to it. The heirs-male of the body of Sir James, the original grantee, had all failed with his ſon, Robert: But James Makgill was only a collateral heir of the firſt Viſcount; and notwithſtanding the comprehenſive term *whatſoever*, and the inefficacy of the words *tailzie and proviſion* inſerted in the letters patent, it was
April 25. 1735. adjudged by the Houſe of Lords, that he had not made out any right to the honours and the titles of Viſcount of Oxfurd and Lord Makgill (*s*).

In

(*s*) "The Earl of Crawfurd reported from the Lords "Committees for Privileges, to whom was referred the pe- "tition of James Makgill Viſcount of Oxfurd, That the "committee had conſidered of the ſaid petition, and heard "counſel, and examined witneſſes, on the part of the peti- "tioner; and read grants, ſurrenders, patents, charters, in- "quiſitions, retours, and marriage-articles; and likewiſe "heard counſel for Robert, ſon and heir of Chriſtian daugh- "ter of Robert late Viſcount of Oxfurd, as alſo counſel on "behalf of the Crown; and are of opinion, that the peti- "tioner has not made out any right to the honours and "titles

In 1761, a competition arose between William Douglas Earl of March, and Sir Thomas Kennedy, about the honours and dignities of Earl of Cassillis and Lord Kennedy. The former, a great-grandson of John the seventh Earl of Cassillis by his eldest daughter Anne Countess of Ruglen, was an heir general of John Kennedy the last Earl of Cassillis, who had died without issue in 1759: But the latter was heir male descended of the body both of David the first Earl of Cassillis, and of Gilbert the first Lord Kennedy (*t*): And on this ground, after a full consideration, judgement was given by the House of Lords in favour of Sir Thomas Kennedy (*u*). Cassillis. Jan. 27. 1762.

" titles of Viscount of Oxfurd and Lord Makgill of Cous-
" land: Which report, being read by the clerk, was agreed
" to by the House." Journals of the House of Lords, 18th March 1734, 10th February 1735, and 25th April 1735.—See B. 4. Ad. Observ. VI.—Acts of Sederunt, 27th Feb. 1740.—Ad. Case, ch. 6. p. 82.

(*t*) P. 269. above.

(*u*) " Resolved and adjudged by the Lords Spiritual
" and Temporal in parliament assembled, That the peti-
" tioner Sir Thomas Kennedy hath a right and title to the
" honour and dignity of Earl of Cassillis, as heir-male of the
" body of David the first Earl of Cassillis; and that he hath
" also a right and title to the honour and dignity of Lord
" Kennedy, as heir-male of the body of Gilbert the first Lord
" Kennedy." Journals of the House of Lords, 10th Feb. 1761, 27th January 1762.

Borthwick.

The general principle was again eſtabliſhed in a caſe ſtill later than the preceding. In 1762, Henry Borthwick, a male deſcendant of the firſt Lord Borthwick, claimed the title and the dignity, which, on that account, were adjudged by the Houſe of Peers to belong to him (*x*).

SECT. VI.

Were Peerages limited after 1587 *to Heirs-male deſcended of the Noblemen who poſſeſſed them in that Year?*

Are thoſe Peerages, which aroſe out of territorial honours, limited to heirs-male deſcended of the noblemen who poſſeſſed them in 1587?

THE foregoing caſes, in which both an heir-male and an heir general exiſted to claim the ſucceſſion in thoſe characters, and in which the Peerages devolved to the former in preference to the latter, ſeem abundantly to eſtabliſh, "That

(*x*) "Reſolved and adjudged by the Lords Spiritual "and Temporal in parliament aſſembled, That the peti- "tioner hath a right to the title, honour, and dignity of "Lord Borthwick, as heir-male of the body of the firſt "Lord Borthwick." Journals of the Houſe of Lords, 29th January and 8th April 1762.——See alſo note (M) at the end of the volume.

"That thoſe honours, which were introduced in-
"to Scotland in 1587, are now limited to heirs
"male deſcended of the perſon firſt ennobled."
But muſt the heir, entitled to inherit a Peerage, be ſprung from the Lord in whom the dignity was veſted at the great revolution then produced in the conſtitution; or is it ſufficient if he derive his lineage from that perſon on whom the rank of Nobility had originally been conferred? A queſtion, which appears not to have ever been propoſed by any lawyer, and which, I ſuſpect, applicable precedents cannot be found to determine, poſſibly, on that account, will be haſtily affirmed by ſome to be perfectly clear. Others, whoſe minds accuſtomed, before pronouncing, to examine objects with care, and, after examination, to diſcover real truth to differ widely from firſt appearances, are inclined rather to ſcepticiſm than to precipitation, may perhaps perceive a difficulty in reſolving it. In juriſprudence, a ſcience ſtrictly logical, your determinations ought all to be deductions exactly conſonant to principles, without which deciſions will never be either ſteady and uniform, or impartial and ſatisfactory: And, amidſt the heſitation which muſt diſtract the underſtanding at forming an opinion on a point entirely new, perhaps plauſible arguments are not wanting to excite a doubt, whether at

preſent it be enough to give a good right to any Peerage, which was originally territorial, that he, who claims it, trace his lineage from the perſon who was owner of the fief at the time of erecting it into a dignity.

The rules which govern Peerages in their deſcent are very different from thoſe which regulate ſucceſſion to lands; and the terms, employed to direct it, are interpreted in their caſe much more ſtrictly than the ſame expreſſions are in the caſe of fiefs: Otherwiſe honours could never become extinct as long as any heir, collateral, aſcendent, or deſcendent, of the perſon on whom they had been conferred, continued to exiſt, unleſs the deed beſtowing them contained a condition ſpecially providing, that, in default of thoſe called by it to inherit them, they ſhould merge in the crown. An eſtate granted to a man, either with or without a ſubſtitution of others to ſucceed after him, to heirs male only as well as to heirs general, remains with his heirs, as long as any are found in exiſtence to exclude the King, the laſt heir, who is never entitled to take till every perſon inheritable by law is extinct. But Peerages, not being property, are more confined in their deſcent, and go not to any heirs indefinitely, without exception or limitation. The words in which they are granted are regarded; and

and thoſe conferred on heirs male do not, on their failure, devolve, like landed eſtates conveyed in the ſame terms, to heirs female (*y*). A grant, made expreſsly in favour of a perſon who aſpires to a Peerage, is required to give a right to it. Does it not follow, that thoſe who produce words, perfectly full, and abſolutely unambiguous, as well as directly applicable to them, are alone entitled to take an honour by inheritance; and that grants of Peerages, explained as they are in a limited and unuſual meaning, contrary to their plain tenor and common import, muſt be underſtood in the ſtricteſt ſenſe poſſible to be put on the expreſſions uſed in them? otherwiſe, on what pretext are they limited at all?

In ancient times, the nobility of a man, whoſe exaltation was derived ſolely from that of his property, depended entirely on his connection with it. The moment he was diveſted of the ground which had been raiſed to honour, every right annexed to that ground, among others the dignity, departed from him; and after being deprived, he could not tranſmit either to his deſcendants, or to his collateral heirs, a title, more than an eſtate, which remained not with himſelf. Their claim was wholly dependent on the contingency, that the noble fief ſhould devolve to them.

(*y*) See B. 3. f. 8. near the end.

Thoſe, ſprung from a family after their eſtate had been nobilitated, poſſeſſed no pretenſions either to inherit the honours, or to ſit in parliament before 1587, unleſs the lands devolved to them, no not even if they happened to be the neareſt heirs entitled in the ordinary courſe of legal ſucceſſion to take both: And as, on ſucceeding after its legiſlative quality had been taken from the fief, they could acquire no more than was then appendant to it, their ſucceſſion even to the noble eſtate after 1587 could not give them ſtronger pretenſions to a dignity, which had ceaſed to be connected with it, than any other perſon, who, without being lineal heir, had ſucceeded under an entail. Of courſe, a noble deſcent which had commenced, no more than a noble poſſeſſion which had been held, before 1587, could not after that year be at all regarded in a queſtion concerning the right to a Peerage. A relation, borne immediately to the particular perſon who poſſeſſed the honour in 1587, became then the only ground on which a good claim could afterwards be laid to it. The propinquity, by which alone that rank could be veſted, was obliged to point towards this nobleman; and he became the ſource from which a connection, efficient of nobility, was required to be traced.

Sup-

Suppoſe that, in the eleventh century, a parcel of lands had been erected into an Earldom by Duncan or by Macbeth; that the perſon, in whoſe favour they had been elevated to this rank, had found himſelf in a few years obliged to ſell them, and that none of his deſcendants had ever re-acquired them, but that in 1587 they had ſtill belonged to another family; I aſk, Would his heir-male, on proving his deſcent, have then been entitled, after a revolution of ages, to be reſtored to the Peerage? ſurely not. His anceſtor's right to a place in parliament, and even his pretenſions to the title of honour, paſſed from him as ſoon as he parted with his eſtate, and both went along with it to the purchaſer. In 1587, therefore, the heir-male, deſcended of the firſt Earl, poſſeſſed not a ſeat in that aſſembly: He was not even noble: And of conſequence he was not one of the Lords of parliament who were favoured by the ſtatute made in that year.

Suppoſe that, inſtead of ſelling the earldom, the firſt Earl had ſettled it on a younger ſon, and that the noble eſtate had continued in the younger branch of his family till 1587; a caſe of which examples have been cited: Would the heir-male lineally deſcended from the eldeſt ſon, who had been diſinherited in the ancient days of Malcom

Canmore, have been entitled, on eſtabliſhing his propinquity, to reclaim the honour in the diſtant reign of James VI.?

Or ſuppoſe that the firſt Earl had not diſpoſed of the earldom, but that it had continued for ſome generations to deſcend uninterruptedly in the right line of males, and that the nobleman, who poſſeſſed in the year 1400, had either ſold it to a ſtranger from his blood, or ſettled it on a younger branch of his houſe: I imagine, nevertheleſs, it will univerſally be allowed, that the perſon, who was both heir-male, and lineally deſcended of him who had diſpoſed of the earldom in 1400, as well as of the original Earl who had been ennobled in the twelfth century, would not have had a good right to the Peerage in 1587.

In 1771, George Sutherland of Forſe, heir-male of the old Earls of Sutherland, was found by the Houſe of Lords not to retain a juſt claim to that ancient dignity, which in 1514 had devolved to an heir-female, Eliſabeth Sutherland, whoſe male deſcendant was rightfully poſſeſſed of the noble fief in 1587.

Objects are obſcured by diſtance, and the perceptions, produced by ſuch as are very remote, are commonly faint. Duration of poſſeſſion, exhibiting to view a long courſe of examples of all the powers derived from right, and exciting an idea

idea of ſomething which a ſtrong reſemblance renders ſcarcely diſtinguiſhable from it without a nicer inſpection than moſt ſpectators are able to give, begets by degrees a notion of right: and time and habit, even in the caſe of uſurpation, add continually more and more firmneſs and ſolidity to this imagination. But ſuppoſe that thoſe ſettlements, which were made by the Earl of Caithneſs (*z*) and by the Earl of Huntley (*a*), had been executed in 1580, a year in which they ſhould have produced the ſame effects as followed upon them in the fifteenth century, and mark the conſequences.

A man, who before 1587 ſucceeded to a barony held of the crown, obtained a right to ſit in parliament; but one, who ſucceeded after that year, no longer derived from it an ineleCtive ſeat. In like manner, a perſon, who after 1587 ſucceeded to an earldom, would enjoy all the proprietary rights belonging to that feudal dignity: The title, however, and the rank of Earl, which after 1587 marked not the proprietor of an eſtate of a certain denomination, but an exalted order, conſiſting of hereditary legiſlators, and which did not continue to reciprocate to the name retained by the fief, would not belong to the owner of it, unleſs he happened alſo to be found

(*z*) P. 211. above. (*a*) P. 174. above.

found in the condition without which they could not veſt in him, or unleſs he was the perſon entitled to them by blood.

My Lord, if thoſe Peerages, which were formed in 1587 out of dignities that had originally been territorial, be not limited to heirs-male deſcended from the perſons who were then poſſeſſed of them, one of three alternatives, each attended with difficulties, muſt be adopted to govern their ſucceſſion. Either they muſt deſcend in the direct line of the lawful blood of that nobleman in whoſe favour the lands were firſt nobilitated: Or ſome other individual muſt be ſingled out among the intermediate Lords who poſſeſſed them, and his heirs muſt be preferred to thoſe of all the other poſſeſſors: Or the heirs of every perſon, who ſucceſſively enjoyed them during the whole period from their original elevation to the year 1587, purchaſers as well as others, muſt all be equally and indiſcriminately entitled, by kindreds and even by branches, without any exception, to inherit them. The firſt hypotheſis hath already been ſhewn to be adverſe to the genuine nature of thoſe honours, which rendered them inſeparable from the noble fiefs erected into them; to the eſtabliſhed practice, which was entirely conformable to that nature; to the ancient conſtitution of the Scotch par-

parliament, in which ſeats were allowed only to freeholders, who held lands of the crown; and to the expreſs terms of the act paſſed in 1587, which, ſuppoſing the Lords who were then poſſeſſed of nobility to be the only members intended to be admitted for the future to ſit without election, prove that a ſacred regard was meant by the ſtatute to be had to the poſſeſſion held in that year. The ſecond ſuppoſition is liable to all the ſame objections as the firſt, beſides that it ſhould then be impoſſible to diſcover any general rule, founded on rational principles, for pitching on the particular perſon whoſe heirs ought to be preferred to all the other poſſeſſors. The third, by its perplexity, would confound the whole law concerning Peerages, and might cauſe titles almoſt innumerable, yet exactly the ſame with each other, to ſpring out of every ancient honour.

The poſterity of a perſon, who in any year of the long period during which honours continued to be territorial, in 1586 for inſtance, had diveſted his family of the noble fief, could never afterwards ſucceed in right of him; becauſe the dignity had for ever parted from them, as irrevocably as if they had never been noble. The Peerage could go only to the heirs of the purchaſer, that is, of him who was both Lord of par-

parliament and owner of the eſtate in 1587.

The nobleman, in whom the honour was then veſted, is the firſt, among all the poſſeſſors of it, who can properly be denominated a Peer. None of his predeceſſors enjoyed that illuſtrious pre-eminence, an excluſive and a perſonal right, in conſequence of their dignity merely, to ſit in parliament by inheritance and without election. That, therefore, which, in the juſt ſenſe of the word, can alone be termed the Peerage, dates its origin only from him, and he is the perſon who ought to be accounted the firſt that was ennobled. His anceſtors were no more than feudal owners of grounds diſtinguiſhed by a particular denomination: And as a genuine Peerage can be conveyed only in the pure blood which has enjoyed it, the parliamentary dignity, the thing here to deſcend, can now go only to perſons whoſe deſcent is derived in a right line from the Lord who ſat in parliament, or who became a Peer, in 1587; the firſt nobleman poſſeſſed of that high privilege.

In 1587 a greater change was produced both on the internal nature and on the legal deſcent of territorial honours, than on thoſe of perſonal dignities; and, if the Peerages, erected out of the former, became then deſcendible only to heirs male ſprung from the perſon ennobled, thoſe

thoſe, created out of the latter, muſt aſſuredly be limited in the ſame manner. It is natural alſo at firſt thought to ſuppoſe, that ſuch as had always been diſincumbered of the overbearing weight of land, would be ſurer and more independent poſſeſſions, as well as more ſtrictly entailed to the blood of him who had originally been raiſed to them, than thoſe which had been beſtowed on property only; and perhaps, on this account, it may appear more violent to confine their deſcent, within the narrow boundaries which have been deſcribed, to heirs of the noblemen who poſſeſſed them in the late days of James VI. But before 1587 perſonal had not, more than territorial titles, imported parliamentary ſtates, which, amidſt a ſtrong, but deceitful reſemblance, are eſſentially different from both of them. In that year an order was ſet to nobility; and, as all noble honours, having been converted into proper Peerages, were then rendered homogeneous, it is not likely that the ſame ſpecies of hereditaments either could be intended, or would be ſuffered to be governed after it by different rules of ſucceſſion (*b*).

Are thoſe Peerages, which were formed out of perſonal honours, alſo limited to heirs male deſcended of the noble Lords who poſſeſſed them in 1587?

(*b*) See note (N) at the end of the volume.

SECT.

SECT. VII.

Causes of the Irregularities to which Peerages were sometimes incident in their Descent after 1587.

THE principles, which have been explained, will probably be found to be those by which honours were generally governed in their descent; for I dare not affirm that they were steadily followed in all cases without any exception. In consequence of the feebleness and the disjointedness of government, of the remarkable brevity or great imperfection of the laws, and above all, of the resistless force of landed property which bore every thing before it in Scotland, right was sometimes grosly outraged there: Peerages were late of arriving at their full importance: It was long before people attained just ideas concerning them: And a man must be little acquainted both with the general history of that country, and with the memoirs of particular families, who can assert, that, after 1587, more than before it, any inflexible rule was invariably applied in practice to the regulating of their succession (*c*).

In

(*c*) Hawthornden, p. 127. 144. 220.

In the ſixteenth, and even in the ſeventeenth century, the Scotch parliament met not either to impoſe exhorbitant taxes under the ſpecious denomination of ſupplies neceſſary for public ſervice, or to vote immenſe ſums to be diſtributed in judicious portions among its own members. Objects, leſs profitable to individuals, engroſſed their attention; and during many ages little advantage could be gained by rapacious venality from attending that aſſembly. The ſubjects of its deliberations, and the duration of its meetings, were indeed gradually enlarged after the Reformation: The nobility, too, was highly exalted in rank, and the commonalty was proportionably debaſed, in the time of James VI. But, from the ſingular conſtitution of that ſovereign court, neither were ſeats in it greatly raiſed in value, nor was an addition, correſponding to that made to the dignity of the Peers, derived to their weight, by the alteration effected on their condition in 1587.

The committee of articles.

In an aſſembly to which every freeholder might repair, buſineſs could not be expedited with underſtanding, or even with decency. Amidſt the tumult and the uproar to which numerous and mixed conventions are continually incident, ſpeeches can be diſtinctly heard by few of the multitude to whom they are there addreſſed, and many

many of the members who compoſe them muſt be very unfit to decide on the profound ſubjects on which they are called to deliberate. Affairs were neceſſarily obliged, for diſcuſſion or for preparation, to be referred to committees. With this view, thoſe termed LORDS OF the ARTICLES were appointed for digeſting all matters of a public nature. That committee, a very ancient one in the Scotch Parliament, was generally compoſed of perſons taken from each eſtate; and no doubt the royal inclination would often poſſeſs a great authority in directing the voices of their electors; but the election itſelf, the formal act, ſeems not to have ever been made by the Crown. Even Charles I. and Charles II. princes who were not haſty to part with any prerogative which had been exerciſed by their predeceſſors, never pretended to the power of appointing them. Queen Mary, on being twitted by Lord Ruthven with having, by a ſecret influence antecedently exerted in her court at Seaton, over-ruled in 1566 a regular nomination which probably had afterwards been made of them at Edinburgh, diſclaimed having had even this extrajudicial ſhare in recommending to choice ſome of her devoted tools on whom the votes had fallen. It is highly probable, that the Articles were originally choſen by the body whoſe authority was delegated

to

to them (*d*). From a letter, perhaps carelefsly expreſſed, which was written by that Princeſs to Bethune her ambaſſador at Paris, it is clear that the election mentioned there was made in Parliament by thoſe members, who, after an adjournment on the 4th of February, having been again convoked according to cuſtom, had held on the 7th of March (*e*), the ſpiritual as well as the temporal intereſt, a

Z meet-

(*d*) Convocatis tribus regni ſtatibus ibidem congregatis, electæ fuerunt certæ perſonæ ad articulos, datos per dominum Regem, determinandos, data cæteris licentia recedendi. *Title prefixed to the acts of the Parliament held at Perth on the 26th of May* 1424.

" To the articles put by the King to the Prelates, mighty " Lords of Parliament, Earls, and Barons, to be deemed " by certain perſons thereto choſen by the three eſtates." *Title prefixed to the acts of the third Parl. of James I.*

" With power committed by the whole three eſtates to " certain perſons under written, to commune and conclude " upon the matters after following; which perſons being " called and compeared: And theſe are the names," &c. *Title prefixed to the acts of the fourth Parl. of James III.*

" The ſtatutes, ordinances, and concluſions, adviſed and " concluded by the Lords choſen to the articles thereupon." *Title prefixed to the acts of Parl.* 1491.—See alſo the titles prefixed to the acts of Parl. ſecond and Parl. fifth of James I.—and of c. 34. of Parl. 1451.—Erſkine, l. 3. 5.—Parl. 1567. c. 25. —Parl. 1581. c. 9.—St. Dav. II. c. 47.—St. Rob. II. c. 1.

(*e*) Perhaps the Queen, or the tranſcriber, miſtook dates.

meeting sufficiently regular on purpose to make it (*f*). Their number, which, after frequent variations, was at last ordered (*g*) to be equal, and never fewer than six or more than ten, in every estate, was commonly eight of each (*h*): And in very early times, their election was made after a form artfully contrived, by which the Court, without directly nominating them, was almost insured that none, who would not be entirely obsequious to its will, should be put on the committee. The ecclesiastics elected eight noblemen; the nobility chose eight clergymen (*i*); and these sixteen made choice of eight burgesses, and also, after representation had been introduced into counties, of eight commissioners of shires (*k*). From the account given by Hamilton, by Spotswood, and by Randolph, of the transactions of the Parliament which was held in 1560, it appears, that even in the time of Queen Mary they were chosen after that manner, or one extremely like it. Hamilton, the archbishop of St Andrew's, still noted for his lewdness, for his catechism, for his cruelty, and for his death, was present, as well as Randolph, in that

(*f*) Keith, Appendix, p. 126.—History, p. 326. 331. &c.

(*g*) Parl. 1587. c. 37.

(*h*) Parl. 1474. ch. 75.—Parl. 1477. ch. 97.

(*i*) Keith, 487. (*k*) Parl. 1663. c. 1.

that aſſembly (*l*); and Spotſwood's father, the ſuperintendant of Lothian, ſuſtained an eminent part in thoſe buſy ſcenes. Neither Hamilton indeed, nor Spotſwood (*m*), ſays that the noblemen were choſen by the clergy: But, as the whole landed intereſt was zealouſly attached to the religious innovations which were going immediately to be eſtabliſhed, and the choice could not fall on Lords diſaffected to the new ſyſtem, the ſame cauſes, which, in a hiſtory of the overthrow of Popery, rendered the nomination of the eccleſiaſtics a matter worthy of particular notice, extended not with them to that of the nobility: And Spotſwood's omiſſion is ſupplied by the expreſs aſſertion of Randolph (*n*), an envoy and a foreigner, to whom every thing then beheld by him carried an appearance of novelty, and who was bound by duty, as well as prompted by curioſity, to attend accurately to the proceedings. In fact, among all the noblemen preſent in that numerous Parliament, only three diſſented from the act which approved of the doctrine of the reformers; the Earl of Athole, Lord Bothwick, and Lord Somervel; who, in terms which might have proceeded equally from bigots and from infidels, de-

(*l*) Keith, p. 146. 63.——Crawfurd, Officers of State, p. 375. 381.—Pitſcottie, p. 362. 365. (*m*) P. 149.
(*n*) Maitland, p. 929.—Robertſon, Append. 4.

clared laconically, "That they would believe as their fathers had done before them (*o*)." The burgeſſes, if credit is due to Randolph, were then choſen by the eſtate to which they belonged; and if he was not miſtaken, it muſt have been afterwards that the right of nominating them came to be transferred to thoſe ſixteen who had previouſly been elected from the eccleſiaſtics and from the nobility. As the inferior members of the landed intereſt rarely attended in conſiderable numbers, the ſmall Barons, in preſence of their ſuperiors, could not aſpire to the honour of being put on the Articles; but, after they had become obliged to ſerve by repreſentatives, and a diſpenſation from attendance had been granted to the other freeholders, ſome of their commiſſioners, in a number equal to thoſe elected from the boroughs, were ordained (*p*) to be named on that committee, which, as at leaſt after the reformation the prelates were commonly either the creatures or the rulers of the Court, was cauſed, in conſequence of the ſingular mode of chooſing them, always to conſiſt of perſons attached to adminiſtration: But the influence of miniſtry was almoſt abſolutely ſecured in it by another peculiarity remarkable in its extraordinary frame.

Among

(*o*) Spotſwood, p. 150.—Knox, p. 253.
(*p*) Parl. 1587. c. 114.

Among the ordinary officers of the King (*q*), to whom certain departments in the government were intrusted, and who discharged their respective duties each immediately under the Sovereign, some were entitled, by virtue of their offices, to sit in Parliament, in convention, and in all meetings which concerned the state; and were distinguished on that account, from the other officers of the Crown, by the appellation of the Officers of State. The particular offices, admitted, or rather nominated by Majesty, to sit on this title, seem not to have always been exactly the same (*r*), but were at last declared in 1617 to be eight; the Lord High Chancellor, the Lord High Treasurer, the Lord Privy Seal, the Lord Secretary of State, the Lord Clerk Register, the Lord Advocate (*s*), the Lord Justice Clerk, and the Lord Treasurer Depute (*t*): And that important privilege was so much understood to belong both to prerogative and to them, that, during times in which any of them was vested in joint commissioners, the Crown might appoint one person to sit for that office in Parlia- Officers of State.

(*q*) Parl. 1585. ch. 20. 13. 17.—Parl. 1587. ch. 31.—Parl. 1592. ch. 135.—Parl. 1633. ch. 9.—Parl. 1641. ch. 16. 20. 21. 29. 68.—Parl. 1693. ch. 6.

(*r*) Parl. 1567. ch. 25.—Parl. 1581. ch. 9.

(*s*) Parl. 1532. ch. 6. § 33.

(*t*) Sir G. Mackenzie, of Precedency, ch. 8.—Wight, T. 2. f. 3.

Parliament; a power which was ſtill retained even after the Committee of Articles had been aboliſhed in 1690 (*u*).

The Earl of Drumlanrig, who, under the title of Duke of Queenſberry, bore ſo conſiderable a part in effectuating the union of the kingdoms, was the firſt Scotchman that joined the Prince of Orange (*x*), and ſat, under authority of a letter by which King William named him to occupy the place of Lord High Treaſurer, in a Parliament held in 1693 (*y*).

It was in this character, alſo, that his long political life was begun by Lord Archibald Campbell, who was afterwards created Earl of Iſlay, and who, after having enjoyed during a great part of his days the ſovereign direction of Scotch affairs, had the rare felicity, in 1761, of dying on the verge of eighty without a moment's pain, in full poſſeſſion both of his faculties and of his power. In the Parliament to which his brother the young Duke of Argyle, who became ſo conſpicuous during the adminiſtration of Sir Robert Walpole, was High Commiſſioner, Lord Archibald ſat on a letter, by which Queen Anne appointed

(*u*) See a liſt of the members of the Parl. 1703, the laſt of Scotland, in Ridpath's account of their proceedings.

(*x*) Carnwath's Memoirs, p. 9.

(*y*) Index to the acts of that year.

pointed him to the place and the vote of Lord High Treaſurer (*z*); an office, which, after the Duke of Queenſberry, in conſequence of the ſuperior credit acquired by the Earl of Perth, had been removed from it in 1686, was always in commiſſion (*a*).

A ſimilar power was allowed to royalty in caſes in which more perſons than one were nominated ſeparately to hold any of thoſe offices, each independently and fully in himſelf. Sir Archibald Johnſtone of Warriſton (*b*), a devout, learned, diſintereſted, reſpectable judge, whom Burnet, his nephew, celebrates for the quickneſs of his thought, the vehemence of his ſpeech, the ſhortneſs of his ſleep, and the length of his prayers, was ſelected after the Reſtoration to ſuffer for the bold meaſures in which he had concurred before it; and perſonal as well as that hereditary merit giving his children a claim to preferment in 1689, his ſon, James Johnſtone, was ap-

(*z*) Index to the acts of Parl. 1705.

(*a*) Burnet's Hiſtory, V. 3. p. 50.—Crawfurd's Officers of State, p. 423.—Index to the acts of Parl. 1693—1695—1698—1701—1702—1703.

(*b*) Sir Archibald Johnſtone was a Lord of Seſſion, a Commiſſioner of Exchequer, an Advocate for the King, and Lord Regiſter of Scotland.—Parl. 1647. ch. 35.—Parl. 10th—12th March 1649.

pointed Envoy to the court of Brandenburgh: But having afterwards been created by King William one of his principal Secretaries of State, was nominated by a warrant from his Majeſty to ſit Lord Secretary in the Parliament which met in 1693 (*c*).

James Ogilvie, an advocate, in 1689, puſhed himſelf into public notice by a ſtrong ſpeech made in favour of King James, after the Prince of Naſſau had already been raiſed to the throne of England: He diſtinguiſhed himſelf alſo in the ſame cauſe by being one of five, who, in the convention of eſtates, diſſented from their memorable vote which declared that Monarch, by mal-adminiſtration, to have forfeited the Crown (*d*): But having afterwards been called into office by King William, Sir James occupied, in conſequence of a letter from his Sovereign, the place of Lord Secretary in the Parliament which aſſembled in 1696; and, as he had already been choſen a burgeſs to repreſent Cullen, on his promotion a writ was iſſued to that borough to elect another commiſſioner in his room (*e*).

The

(*c*) Parl. 1661. ch. 2.—Parl. 1661. ch. (not printed.) —Parl. 1662. ch. 10.—Parl. 1663. ch 2. (not printed.)—Burnet, V. 1. p. 35.—V. 4. p. 126.—Index to the acts of Parl. 1693.

(*d*) Parl. 1689. ch. 13.—Hume, V. 8.—Carnwath's Memoirs, p. 22.—Crawfurd, p. 247.

(*e*) Index to the acts of Parl. 1696.

The extenſive knowledge, the ſuperior addreſs, the great weight, derived to the officers of ſtate from an enlarged experience, from much practice, and from their high places, rendered the ſway of the Crown almoſt abſolute over that mighty committee, of which, officially, they were conſtituent members. In the public records, the Lords of the Articles are ſometimes termed "thoſe to whom the whole power of "Parliament is committed (*f*);" and as their authority in that aſſembly could not but be irreſiſtible, the Court was enſured of over-ruling moſt of its intereſting reſolutions. All matters, purpoſed to be laid before it, were previouſly examined by the Articles. Bills, which they thought ought to paſs into laws, were prepared by them: And overtures, which had been rejected by their voice, could not regularly be introduced into the Houſe. Antiquity and cuſtom, eſpecially if the ideas of them are frequently invigorated by the aid

Small conſequence even of proper Peerages.

(*f*) Parl. 1471. ch. 52. 58. 61.—Parl. 1474. ch. 75.—Parl. 1483. ch. 108. f. 2.—Parl. 1489. ch. 27.—Parl. 1493. ch. 69. 71.—Parl. 1535. ch. 35.—Parl. 1540. ch. 98.—Parl. 1567. ch. 25.—Parl. 1581. ch. 9.—Extracts from the Records of Parliament, printed among the papers exhibited to the Court of Seſſion in 1706, in a cauſe between the Earl of Crawfurd, the Earl of Sutherland, the Earl of Mariſchal, and the Earl of Errol, about their precedency.

aid of ceremonies, are, with the bulk of mankind, powerful recommendations of public inſtitutions. No doubt, the ſtates of Scotland, like every legiſlative body whoſe ſovereign determinations are controllable only by its own wiſdom, retained a diſcretionary power, which in extraordinary caſes might be exerted by them (*g*), of diſpenſing with that regulation. There are grand occaſions, too, on which to daring ſpirits all forms appear to be puerile elements: Seneſcent government ſometimes diſſolves from inveterate corruption into its firſt principles: And men violently agitated by paſſion, looking only to ultimate ends, cannot always be reſtrained from trampling both under foot with an indignant contempt. But ancient and eſtabliſhed modes, in conſequence of the ſtrong prepoſſeſſion excited by conſtant obſervance of them in favour of their indiſpenſable neceſſity, acquire a firm authority over the mind, which, in ſimilar ſituations tending continually towards its accuſtomed uſages, reſiſts with great force every ſudden departure from them; and the inſtances, in which Parliament either neglected to conſult the Articles, or diſſented from their deciſion, are extremely rare. The other members, either abaſhed into ſilence by modeſty, or

2 ſeduced

(*g*) Parl. 1640. ch. 3.——Fountainhall's Deciſions, V. 1. p. 150. 151. 152.

seduced from duty by expectations, or awed into co-operation by apprehensions, were seldom inclined to oppose overtures which had been brought into the House with all the advantages derived from the decided opinion of that respected committee. Hence the procedure made on their reports was often indecently precipitate; and people, taken by surprise, were either hurried by ministerial audacity, or necessitated from their own ignorance, to agree to them. Despair of success begot in many both an unconcern about measures which they constantly found it vain to resist, and an aversion to an attendance which they knew would be fruitless; and matters were at last brought to this sorry pass, that, till in very late times, each Parliament assembled in a full body only two days. On that, to which they were summoned, the members, riding in great pomp, conducted the King, or the Commissioner, to the House, and, after having chosen the Lords of the Articles, were immediately adjourned: On another day, at a distance from the former, they were again convened either to approve or to disapprove of the bills prepared for their consideration: And on this day the meeting was prorogued or dissolved (*b*). The Committee of Articles

(*b*) Burnet's History, year 1661. p. 162. &c.—Erskine, B. 1. t. 3. § 5.—Keith, p. 34.

Articles was attempted to be regulated (*i*), but was not entirely abolished, even by those zealous conventions which met in the reign of Charles I. and their acts were afterwards rescinded. Hence it was very late before Parliament attained in Scotland that consequence, which in every country naturally belongs to the supreme legislature. The weight and the independence of the nobility, notwithstanding the elevation added in 1587 to their rank, were rather diminished than increased by the innovation then made on the constitution: Inelective feats did not soon become important objects: And their little estimation, often begetting an indifference about them, could not but affect in some cases the regularity of their course in succession. People, not possessed of adequate fortunes, could not be anxious about preserving noble honours, which, disconnected from landed property, and unsustained by it, would often be inconvenient, rather than desirable possessions; and those in wealthy circumstances would not find much difficulty either in assuming, or, for want of competitors, in retaining them. Mens ideas, even about their interest, are not always distinct. Instances might be produced, in which Peerages, the ultimate object of modern ambition and of all servility, were refused to

(*i*) Parl. 1640. ch. 3.

to be accepted, after Parliament had arrived at its juſt authority, and, in conſequence, after they had acquired their proper nature: And a little recollection will ſhew, how, in late, as well as in early periods, their deſcent might ſometimes be diſturbed by other cauſes, as well as by their ſmall value.

Violent diſorders in Scotland.

Even in ſettled times, in which juridical matters are coolly diſcuſſed, like queſtions merely ſpeculative, by acute diſputants, and judicial depravity, amidſt a prevailing corruption, is overawed by public inſpection, mean corrupt artful men, impoſing by a ſpecious language on ſimple auditors, are often able to employ to unrighteous purpoſes thoſe holy places, which ought ever to be preſerved inviolably ſacred to rectitude and to truth; and a ſtrict impartiality cannot always be reached in the retired abodes and ſhady temples of private juſtice. The diſtracted ſtate in which Scotland continued, with little interruption, during the hundred and twenty years that immediately followed the introduction of Peerages in 1587, rendered it almoſt impoſſible for their deſcent even then to be ſteadily governed by fixed and conſiſtent rules. The ſucceſsful attack made in the ſixteenth century on the eſtabliſhed ſuperſtition, the barbarous murther of King Henry, the forcible depoſition of Queen Mary, the baſe aſſaſſination

ſination of Murray the Regent, the long minority of James VI. that Prince's overweening attachment to very worthleſs favourites, the unpopular innovations in religious affairs obtruded on his unwilling ſubjects after his acceſſion to the Engliſh crown; theſe events, which ſucceeded each other with an uncommon rapidity, conſpired to produce much tumult in the nation, and the whole country was divided by them into violent factions, whoſe animoſities were continually inflamed by all the cauſes that operate with moſt force on human paſſions. Hence James's reign was exceedingly turbulent; but as, in his time, matters arrived not at extremities, it may be ſaid to have been peaceable in compariſon of the next, during which, from the arrogant pretenſions of Charles I. and from the unadviſed obſtinacy with which that unfortunate Prince perſiſted in his arbitrary deſigns (*k*), the whole iſland was thrown into one great ferment, and a civil war was at laſt kindled, which terminated in a ſolemn trial and public execution of the King. Soon after that awful cataſtrophe, the Commons reſolved (*l*), in England, That, in the exerciſe of the legiſlative power, they ſhould not take the advice of the Lords, and the Houſe of Peers was declared an uſe-

(*k*) Parl. 1647. ch. 10.

(*l*) Journals, 30th Jan. 6th Feb. 1648-9.

uſeleſs and even a dangerous branch of the legiſlature: Both kingdoms were ſubjected to one Parliament: And, during this period, the Peerage was little minded in either. The parties which principle, intereſt, affection, paſſion, gratitude, reſentment, had generated during the preceding reign, ſubſiſted in full vigour after the Reſtoration; and the treaſonable conſpiracies or political ſchemes (*m*), openly purſued or ſecretly adopted by Charles II. were ill calculated to moderate either their rancour or their zeal. This thoughtleſs libertine, poſſeſſed, amidſt ſtrong prejudices, of a conſiderable portion of good ſenſe, was a little reſtrained by the dread inſpired by his father's ſufferings and by his own exile (*n*): But the furious career, held by his infatuated ſucceſſor, in four years precipitated James VII. from the throne. A government, as well as a party, founded on principles ſeemingly liberal, is always obliged for ſome time to adhere, at leaſt in appearance, to that ſyſtem to whoſe popularity it has been chiefly indebted for its credit; and moſt of the admired improvements, which have ever been made on the conſtitution or the laws of Great Britain, owe their eſtabliſhment to that attention to character, which, operating by ſhame and by fear,

(*m*) Hume's Hiſtory of Charles II. particularly ch. 66.
(*n*) Burnet.

fear, without virtuous affection or ſincere patriotiſm, is ſtill productive of ſome conſiſtency even in public conduct. At the Revolution the Committee of Articles, among the inſtitutions which had then been adjudged by the ſtates of the nation to be grievances (*o*), was finally aboliſhed in the year 1690 (*p*); and as, in conſequence of the abolition of Epiſcopacy, the temporal Lords were formed into an eſtate diſtinct from both the barons and the burgeſſes (*q*), its full importance was thereby acquired both to the Peerage and to Parliament. But long poſſeſſion, good offices, remembered kindneſſes, and perſonal reſentment, ſtill preſerved many friends warmly attached to the abdicated family; and the period, which intervened between the acceſſion of William and the union of the kingdoms, was much too ſhort to extirpate thoſe keen factions which are not wholly obliterated in our days.

In a country, inceſſantly rent by diſſenſion, often involved in civil war (*r*), the voice of right would ſometimes be faintly heard, and, amidſt the noiſe of arms, titles could not always be critically examined (*r*), but each party, without a ſcrupulous nicety, might ſupport with vigour the pretenſions of its adherents. In turbulent times, even a titular

(*o*) Parl. 1689. ch. 18. (*p*) Parl. 1690. ch. 3.
(*q*) Parl. 1689. ch. 3. (*r*) St. Dav. II. c. 31. 41. 44.

tular Lord is not a contemptible acquisition: A feeble junto would not hastily reject any additional lustre derivable to it from a dignified associate: A successful one, either from decency might not incline to disallow pretensions of which they had availed themselves during their adverse fortune, or might find it political, even after affairs had been reduced to order, to admit of doubtful claims, made by zealous partisans, to noble honours. Sir George Hume, a Lord High Treasurer of Scotland, whom Spotswood characterises "a man of few words, but of deep wit," besides the Garter and other honours which were heaped on him by James VI. was created by that King Earl of Dunbar (*s*); and two daughters he had were nobly married; but on his death in 1611, without heirs male of his body, the dignity became extinct. However, at the distance of fourscore years, Sir Alexander Hume, a collateral male, who had settled in Holland, was deputed by the States to congratulate the Stadtholder on his advancement to the throne of England, and presuming, probably, on the credit thence derived to him, assumed the title; and Douglas asserts, that, in 1689, he was acknowledged by King William for Earl of Dunbar; an acknow-

A a ledge-

(*s*) Hume, ch. 45.—Crawfurd's Officers of State, p. 397.—Spotswood, p. 516.

ledgement very insignificant, as Princes, at addreſſing thoſe who are preſented to them, or at deſcribing them in deeds, inquire not into their pretenſions to the appellations borne by them. A Sovereign, recently called in a ſtorm to the crown, would particularly avoid thoſe offenſive diſquiſitions; and Sir Alexander's poſſeſſion was only momentary. Irregularities, ſuch as that, from the ſhortneſs of their duration, and from the contractedneſs of their operation, might excite little jealouſy, or awaken hardly any attention; and even a formal ſanction might ſometimes be obtained for them, if either a ſingle perſon, unoppoſed by a competitor, and guarded in his argument, aſpired to the honour, or his adverſary was diſabled by circumſtances to proſecute his right with vigour (*t*).

SECT. VIII.

Caſes adjudged after 1587.

THE commanding authority of the Officers of State, the over-ruling negative of the Committee

(*t*) See the Caſe of Lord Willoughby of Parham. Journals, 20th Feb. and 20th March 1767.

mittee of Articles, the ſmall advantage derivable from attending parliament, the keen factions by which perſonal enmities and partial attachments were widely diffuſed all over the country, the confuſed conceptions long entertained about noble dignities and their real nature: Amidſt this variety of cauſes, which tended to diſturb ancient Peerages in their deſcent, the anomalous caſes, in which the general rules preſcribed for governing it were tranſgreſſed, ſtill are ſurpriſingly few, in compariſon of thoſe which ſeem entirely conformable to accurate principles; and, perhaps, in theſe rare inſtances, a piercing eye will ſometimes diſcover traces either of alterations regularly made in the courſe of ſucceſſion, in ways competent to effect them, or of conſiderations, ſuch as ought never to enter any deciſion concerning property. Hence, in determining on claims to them, a deciſive weight ought not always to be laid on any poſſeſſion which was held before the Union. Even the judgements pronounced in the only four caſes which came to be tried in Scotland before it; Oliphant, Caithneſs, Buchan, Kincardine; are not, perhaps, entitled to be eſteemed in all points inexceptionable. In the firſt, Laurence Oliphant Lord Oliphant, not having male iſſue, ſettled his honours as well as his eſtate on Patrick Oliphant his heir-male; but Oliphant.

his settlement had not been ratified by the Crown, and after his death Anne Oliphant, his only child, asserted her pretensions to both before the Lords of Session. Charles I. was present in Court at determining the cause; and it was there found, that the deed, by which Lord Oliphant had disposed of his honours, barred the succession of his daughter, but did not vest the Peerage in the person to whom they were conveyed, and that Anne Oliphant had no right to it (*u*). Both the heir-male and the heir-female were excluded by this decision, and the dignity was declared to be at the disposal of the King, who, Sir James Dalrymple says (*x*), granted it to the former. Every word of the decree, made by the Privy Council in the second, Caithness, seems agreeable to just principles (*y*). In the third, on the death of William Erskine Earl of Buchan, without issue, the title was allowed by parliament to David Erskine Lord Cardross, a collateral male, under a remainder created by a royal grant in his favour, in preference to Fraser of Inverallachy, an heir general who pretended to it (*z*). In the fourth, Kincardine, they did not remount to the question, Whether

Caithness.

Buchan.

Kincardine.

(*u*) 11th July 1633. Oliphant v. Oliphant.
(*x*) P 396.
(*y*) Above, p. 326.
(*z*) Index to the Acts of Parl. 1698.—See note (N).

Whether Peerages were then limited to males ſprung from the perſon firſt ennobled? a diſquiſition which Lady Mary Bruce, as well as Sir Alexander Bruce, was intereſted to avoid, as both their claims ſhould have been equally affected by it. The debate maintained between them proceeded on topics totally different. The nobility of the laſt Earl, whoſe death had given riſe to the conteſt, was admitted by them both: Lady Mary founded on deeds executed by him, which deviſed the honour in her favour: That ſettlement was alleged by Sir Alexander to be liable to exceptions which annulled it: And her pretenſions were alſo partly laid on objections perſonal to him. The deciſion, too, ſeems not to have been a definitive ſentence on the matter of right, but a temporary reſolution on the poſſeſſion only (*a*). The affair was referred to the Lords of Seſſion; and the only point on which this court ever came to give an opinion, appears to have been, Whether procuratories of reſignation, or powers granted by the poſſeſſors of peerages to

(*a*) 10th October 1706. "Her Majeſty's High Commiſſioner, and the Eſtates of Parliament, having adviſed "the debate, they admit Sir Alexander Bruce to his ſeat "and vote in Parliament as Earl of Kincardine, reſerving "Lady Mary's right as accords. (Signed) SEAFIELD, Chancellar. J.P.D.P."

reſign their honours, might be executed after the death of the nobleman who had granted them (*b*), except that Sir Alexander Bruce was likewiſe allowed to bring evidence of an incapacity under which he averred that the Earl had lain at making the deviſes in favour of his ſiſter? It was found by a majority of voices, that thoſe procuratories did not become void by the death of the Earl before their execution, but that, if the Queen pleaſed to accept of the reſignation, and to confer the title on Lady Mary, they might ſtill be completed by a new patent in her favour. As ſoon as judgement had been pronounced on that point, the cauſe was carried from the Court of Seſſion, in the manner then employed to enter appeals to the Houſe of Lords. A report could not be made to a parliament which exiſted not after March in 1707; and, perhaps, the parties neglected to proſecute their ſuit to a decree concluſive on the buſineſs. But the determination given by legiſlature in Scotland will univerſally be allowed to be juſt, if no more was intended by it than to declare, that, in ſucceſſion to Peerages, heirs-male are, in doubtful caſes, preferable to heirs-female (*c*).

A

(*b*) Parl. 1693. ch. 35.

(*c*) Index to the Acts of Parl. 1707.—Fountainhall's Deciſions,

A diſtinguiſhed purity, as well as a great accuracy, beſtows a high claim to an authoritative reſpect on all the judgements pronounced in private cauſes by that auguſt aſſembly, to whoſe examination queſtions concerning Peerages have always been referred by the Crown ſince the Union. But few caſes concerning them have come ſince the concluſion of that treaty to be ſcrutiniſed by thoſe honourable judges: And the ancient conſtitution of the Scotch Parliament, the original nature of noble dignities, the various changes undergone by both, and the different rules of ſucceſſion conſonant to them (the principal materials without which ſolid and ſteady opinions cannot here be formed), have not hitherto been laid before that ſupreme court. Hence its deciſions, ſeeming not to be entirely conſiſtent among themſelves, can hardly be admitted for infallible precedents which ought to be invariably followed in ſubſequent caſes; and obſervations ſubmitted on them with freedom cannot, my Lord, be unacceptable to elevated minds, ever anxious to be fully informed and to decide with rectitude.

Deciſions, 28th March 1707, Lady Mary Bruce v. the Earl of Kincardine.—Papers exhibited to the Houſe of Lords in behalf of John Maclellan, Eſq; who claimed the dignity of Lord Kirkcudbright.

Caſſillis. The decree pronounced in 1762, by which the dignities of Earl of Caſſillis and Lord Kennedy were adjudged to the heir-male of the bodies of David the firſt Earl of Caſſillis and of Gilbert the firſt Lord Kennedy (*d*), ſeems to eſtabliſh or to proceed on a general preſumption, that ancient Peerages are limited to heirs-male deſcended of the perſon firſt ennobled; an indiſputable propoſition. But inſtead of a preſumption, convert the principle there aſſumed into a rule, and you degrade from his nobility every perſon male or female, by whom honours were poſſeſſed after the death, and who was not heir-male of the body, of that nobleman: A conſequence deeply intereſting to ſome noble families, which probably was not foreſeen.

Suther land. The dignity of Caſſillis had originally been perſonal: That circumſtance, however, after the diſtinction between territorial and perſonal honours had been obliterated in 1587, not being entitled to regard, it is probable, had not any influence on the deciſion. In another remarkable caſe, relating to an ancient Peerage which had originally been territorial, and which had exiſted more than two centuries before the acceſſion of Queen Mary, that diſtinction was attempted to be revived; indeed, the weight of the argument pleaded in behalf

(*d*) P. 329. above.

half of one of the claimants, Lady Eliſabeth Sutherland, ſeems to have been laid upon it, and this lady prevailed in the ſuit: Nevertheleſs, it was reſolved by the Houſe of Lords, that none of the charters then produced affected the dignity claimed by the competitors, and that their operation was entirely confined to the landed eſtates conveyed in them: A declaration ſubverſive of the diſtinction (*e*).

Had that High Court, drawing a right line, diſtinguiſhed deeds prior to the year 1587 from thoſe poſterior to it, your Lordſhip perhaps will now

(*e*) "Adjudged, That the titles, honours, and dignity of the Earldom of Sutherland deſcended to Eliſabeth the wife of Adam Gordon, upon the death of her brother John Earl of Sutherland without iſſue in 1514, as heir of the body of William who was Earl of Sutherland in 1275, was aſſumed by her huſband in her right, and from her deſcended to the heirs-male (who were alſo heirs of her body), down to the death of the laſt Earl of Sutherland in 1766, without any objection on the part of the male line of the ſaid William: Mar. 21. 1771.

"That none of the charters produced affect the title, honour, and dignity of Earl of Sutherland, but operate as conveyances of the eſtate only:

"That the claimant Eliſabeth Sutherland has a right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl of Sutherland in 1275."

now be of opinion, that their reſolution would have been both well founded in principle and agreeable to practice. But, in the argument on which their judgement proceeded, it ſeems to have been ſuppoſed on all hands, that in Scotland noble dignities had always poſſeſſed a nature exactly the ſame with Scotch Peerages at preſent; a propoſition to which, after the changes ſucceſſively undergone by honours have been explained, it will probably be thought that aſſent ought not to be given.

It was adjudged in the caſe of Sutherland, that, on the death of John Earl of Sutherland, without iſſue, in 1514, the title and the dignity had deſcended to his ſiſter Eliſabeth, as heir of the body of William, who was Earl of Sutherland in 1275; that from her they had deſcended to the heirs-male, who were alſo heirs-general, of her body, down to the laſt Earl who had died in 1766; and that his only child, Lady Eliſabeth Sutherland, by whom the honours were claimed on his death, had a right to them in the ſame character. To a man, my Lord, who analyzes this judgement with accuracy into parts, the pretenſions of that Eliſabeth, who ſucceeded in 1514, will probably appear perfectly indiſputable; but will now be granted to have been founded ſolely on her property of the eſtate, and not to have been

been a bit ſtronger than that of the younger ſon of the Earl of Caithneſs, who, in conſequence only of a ſettlement conveying the fief to him, was univerſally admitted to have acquired right to the honours, yet was no more than a purchaſer. It muſt alſo be owned, that the right of the heirs-male of her body, in particular that of her great-grandſon Alexander, by whom both the fief and the title were enjoyed in the year 1587, is unqueſtionable. I chooſe not to examine the juſtneſs of the concluſion, which appears in 1771 to have been drawn in favour of the amiable Lady by whom both are at preſent poſſeſſed. Her right was eſtabliſhed by that decree: And I ſhall not inquire, Whether a poſſeſſion of an inſignificant title borne by lands, held before 1587, in 1514 more than in 1114, ought now to be regarded in any competition about a parliamentary Peerage; but may obſerve, that the judgement ſeems not eaſily reconcilable to the principle approved in the caſe of Caſſillis; and that, on like grounds, almoſt every ancient honour might be found ſtill to be a feminine, a deviſable, a tranſferable, and even a ſaleable dignity.

The ſucceſſion of Caſſillis and of Sutherland was not determined by any writ limiting their deſcent. In 1609 Sir James Colvil was created Lord Colvil of Culroſs, the dignity declared in the patent

Colvil of Culroſs.

tent conferring it to be descendible to him and the heirs-male of his body, in their default to his heirs-male whatsoever. The heirs-male of his body failed on the death of his grandson, James Lord Colvil, without male issue; and in 1723 John Lord Colvil of Culross, a collateral heir-male of the first Lord, was found to have a right to the Peerage in consequence of the extensive remainder created in favour of heirs male whatsoever (*f*).

Kirkcudbright.

In a later case, a modern Peerage, conferred in 1633 on Sir Robert Maclellan by letters patent containing a limitation couched in terms different from the former (*g*), was found descendible to an heir-male not sprung of the original patentee. His nobility was ascertained by the decision pronounced upon it; and as my present argument was intended to be confined to ancient dignities, it would be improper to go into a critical examination of the grounds on which that judgement proceeded. It is sufficient for my purpose to remark, that the rule there adopted seems to be different from that followed either in Cassillis, in Borthwick, in Sutherland, or in Oxford.

Peerages created by patent are generally held by

(*f*) Journals, 25th anp 27th of May 1723.

(*g*) Sibi, suisque heredibus masculis cognomen & arma dicti

by lawyers to be more limited in their deſcent than thoſe acquired after any other form: And a ſhort ambiguous poſſeſſion; originally ſeized in any of thoſe parliaments (*b*) which were aſſembled in the troubled reign of Charles I. but whoſe acts were afterwards annulled for their unlawfulneſs (*i*); and continued, perhaps, during a few buſy years, before matters could be accurately inveſtigated, after the Reſtoration, by a zealous partizan of either party; but ſpeedily relinquiſhed by thoſe, who, if their right had been good, might ſtill have retained it; and never attempted to be recovered before the Union; can hardly afford ſufficient ground for decreeing any dignity to a collateral heir, male or female, of the perſon firſt ennobled by it, in oppoſition to expreſs words, to which a ſtrict and determinate ſenſe, very different from that annexed to them in caſes of private property (*k*), is affixed by law. A title is eaſily aſſumed: Its origin and its limitations ſoon deſcend into oblivion, unleſs the right of the perſon who takes it be recently conteſted by another: The people entitled to queſtion pretenſions to honours muſt commonly be few; and thoſe

dicti domini Roberti gerentibus; without any other remainder, and even without the word quibuſcunque.

(*b*) Parl. 1647. c. 14.—Parl. 1649. ch. 29.—Parl. 7th Aug. 1649. ch. 27. (*i*) Parl. 1661. ch. 6. 15. &c.

(*k*) Above, p. 332. 333.

thoſe intereſted to do it may not always be apprized of their claim, or able to aſſert it.

The Scotch parliament, during its ſubſiſtence, was both intereſted to check uſurpation and entitled to examine pretenſions; but in 1707 a perpetual diſſolution put a total period to any reſtraint which dread of its interpoſitions could create. The ſixteen noblemen, appointed to repreſent the Scotch nobility in the Britiſh Houſe of Lords, were ſtipulated all to be choſen by their own order: The Lord Regiſter, or two of the principal clerks of Seſſion nominated by him to officiate in his place, were ordered, at every meeting held for making an election, to aſk the votes of the electors: The plurality of voices of the Peers, preſent in perſon, by liſts, or by proxy, was declared to determine the individuals on whom the choice had fallen: And thoſe named by that majority were the delegates whom the clerks, in the return directed to be made by them into Chancery after examining the election, were required to certify to have been choſen. But an apprehenſion was entertained leſt poſſibly the Peers thus aſſembled under royal authority, erecting themſelves into a national council, ſhould reſume their legiſlative functions, or hold corporate conſultations about public meaſures. A ſtatute, to guard againſt that danger, enacted

it

it not to be lawful for them, at any meeting for chooſing their repreſentatives, to act, to propoſe, to debate, or to treat of any other matter, except only the election (*l*). Hence a notion long prevailed that the Lord Regiſter, or clerks officiating for him, were bound to admit the vote of any man who claimed a ſuffrage under a title which ſtood at the Union on the roll of Peers; an idea inconſiſtent both with the duty impoſed on them of returning, after a due examination of the election, thoſe choſen by the plurality, and with the power implied in this obligation, of aſcertaining that plurality by individuating the particular Lords who formed it. The law concerning honours was not fixed or even known in the reign of Queen Anne, but remained to be diſcovered and made afterwards. In conſequence, during the preſent century, claims have been frequently laid to extinct or antiquated titles; and thoſe who claimed them preſumed to vote. But the Lord Regiſter was convinced, by the firſt authorities in the law, that his returning office gave him a conſequential right to refuſe votes in the firſt inſtance; and the Earl of Morton, a nobleman of diſtinguiſhed abilities as well as of eminent learning, whom I am fond to number among the friends

(*l*) Parl. 1707. ch. 8.—6to An. ch. 22.

friends of my father, exerted that rejecting power.

A reſpect for its own dignity alſo obliged the Houſe of Lords at laſt to interpoſe. The Lords Committees for Privileges were directed (*m*) "to conſider of and make up a liſt of the "Peers of Scotland at the time of the Union, "whoſe Peerages are ſtill continuing." Orders were afterwards made by the Houſe on William Graham (*n*), Charles Roſs Fleming (*o*), William Alexander (*p*), Henry Borthwick (*p*), William Maclellan (*p*), Alexander Rutherford (*p*), and David Dury (*p*), perſons who had taken upon themſelves reſpectively the titles of Earl of Menteith, Earl of Wigton, Earl of Stirling, Lord Borthwick, Lord Kirkcudbright, and Lord Rutherford, to ſhow the authority on which they had aſſumed theſe titles. Fleming, Alexander, Borthwick, Maclellan, Rutherford, and Dury, attended the committee, and undertook to proſecute their claims: But Graham did not attend: And after ſome procedure, reſolutions were made, ordering, that William Graham (*q*), Charleſs Roſs

(*m*) Journals, 9th March 1761.

(*n*) Journals, 27th Jan. 1762.

(*o*) Journals, 16th Nov. 1761.

(*p*) Journals, 16th March 1761.

(*q*) Journals, 2d March 1762.

Roſs Fleming (*r*), William Alexander (*s*), Henry Borthwick (*t*), William Maclellan (*t*), Alexander Rutherford (*u*), and David Dury (*u*), or any perſon claiming under them, ought to be conſidered as having no right to the honours aſſumed by them, ſhould not preſume to take the titles, and ſhould not be admitted to vote on them in the election of any Peer of Scotland, till they had made out their claim, and it ſhould be allowed in courſe of law. The right of Henry Borthwick (*x*) and John Maclellan (*y*) was accordingly adjudged to be good to the dignities claimed by them. Still however uſurpations, in the caſe of honours, are perhaps more frequent in Scotland than is ſometimes imagined; and the precedents which have been cited prove, that no general principle hath hitherto been eſtabliſhed, by the only competent authority, for governing their ſucceſſion.

It will not be pretended that each Peerage devolves in a courſe peculiar to itſelf. Amidſt the viciſſitudes to which, either from their intrinſic conſtitution, or from external cauſes, noble ho-

(*r*) Journals, 25th March 1762.

(*s*) Journals, 10th March 1762.

(*t*) Journals, 14th December 1761.

(*u*) Journals, 15th March 1762.

(*x*) See p. 330. above. (*y*) See p. 372. above.

nours might be ſubject in North Britain, theſe dignities always poſſeſſed a nature eſſentially proper to themſelves; and it muſt be owned to be important both to the ſecurity of the nobility, and to the reputation of the law, that, in future, their deſcent be ſteadily governed by uniform and invariable general rules. A conſiderable difficulty may indeed be found in fixing on any which can juſtly be applied to them in all caſes: But it will probably be granted, that ſuch as are conformable to their preſent nature, ought now to be conſtantly followed in determining their ſucceſſion.

From the connection which Scotch Peerages originally had with fiefs, mens ſentimens might continue ſome time to be not a little warped about them: But inconſiſtencies were detected by degrees, and not long after 1587 lawyers had already perceived that the property of lands did not affect the right to Peerages. The power, to which Lords had pretended of diſpoſing of them, came alſo to be reſtrained. At the Union indeed honours were ſtill ſuppoſed to be reſignable into the hands of the Crown, an act of which the incongruity had not yet been diſcovered; and the ſeries of perſons, for whom they had originally been deſtined, could then be legally altered by the joint deed of their poſſeſſors and

and of the King. But after that event, thoſe entitled to inherit them could not be diſappointed of their chance of ſucceſſion, and in this reſpect their right became indefeaſable. Other privileges alſo were acquired by them: The ancient Peerages of Scotland were all converted into Peerages of Great Britain (*z*): The laws concerning them have thence ſuſtained conſiderable alterations; and the rules, by which their devolution is determined, ought not, more than other matters, to contradict the form then given to them.

Dignities, which had ceaſed to be claimed, or had been diſcontinued to be poſſeſſed any conſiderable time before the Union, in all probability had then become extinct. That ſtrong preſumption poſſibly will appear of itſelf ſufficient to ſupport the opinion, that in future theſe particular dignities ought on no pretext to be allowed either to heirs-female deſcended, or to collateral heirs-male of any of the former poſſeſſors of them.

My Lord, I have already (*a*) laid before your Lordſhip ſome obſervations concerning the noblemen from whom lineage ought here to be traced; and your liberal mind, maintaining a ſteady reſpect to thoſe principles which in the preſent af-

(*z*) Parl. 1707. ch. 7. § 23. &c. (*a*) Sect. VI. above.

fair ought alone to enter into conſideration, may perhaps perceive it to be congruous to the condition which was acquired by Scotch Peerages in 1587, that they be now limited in all caſes to heirs-male deſcended of the Lords who poſſeſſed them in that year. This rule ſeems to be the only one to which all the phenomena, obſervable about territorial honours, can be reconciled; but, contradicting reigning prejudices, which from long inattention have gained much authority, may alſo appear too bold to be adopted: And probably your Lordſhip will think it both more proper and leſs violent, that they be diſtinguiſhed from their origin into two claſſes, ſuch as originally were perſonal dignities, and thoſe which aroſe out of territorial honours; that the former be permitted, like the earldom of Caſſillis, to deſcend in all caſes, without any limitation, to the heirs-male of the bodies of the noblemen who were firſt advanced to them; and that the latter alone be reſtrained from aſcending higher than the year 1587.

Few old Peerages can now be pronounced, with perfect aſſurance, to have originated from titles merely perſonal: And if thoſe, which can be authentically proved either to have exiſted before the lands belonging to their poſſeſſors were raiſed to the dignities correſponding to them,

them, or to have truly been granted perſonally in parliament, ſhould be permitted to go to heirs-male ſprung of their ancient Lords before 1587, no great violence would be done to the conſtitution, nor would an unbearable inſult be put on the nobility. All others, whoſe origin is unknown, which are found not to be older than the analogous honours beſtowed on the fiefs of their owners, and which ſeem to have been perpetually co-exiſtent with them, may be preſumed to be territorial, and, on this account, ought perhaps to be limited to heirs-male lineally deſcended of that nobleman, who was firſt created a Peer by act of parliament in 1587.

Allow me, my Lord, in a ſhort digreſſion, to add, that, in the caſe of Peerages conferred by patent, the terms in which the perſons, to whom they are deſcendible, are there deſcribed, muſt alone regulate their deſcent; that, in explaining theſe, a fixed conſtruction ought invariably to be put on the ſame technical expreſſions; and that no regard ought ever to be paid to the different courſes in which, in particular caſes, thoſe honours have actually devolved; otherwiſe, every thing relating to their ſucceſſion will be involved in inextricable confuſion. The word HEIRS cannot in one caſe be extended to collaterals and to females, and, in another caſe exactly alike, be

limited to defcendants and to males: In one family, the phrafe HEIRS-MALE muft not be reftricted to heirs-male of the patentee's body, and in another family be interpreted of heirs-male without any limitation: And Peerages created after 1587, by grants in writing, feem to be defcendible only to heirs-male of the bodies of the original grantees, unlefs expreſs words, perfectly clear, and abſolutely unambiguous, direct them to go to heirs-female, or to collateral males. In the law concerning them, the term HEIRS is rather defcriptive of the grantees on whom they are beſtowed by the Crown, than expreſſive of thoſe who on the death of an anceſtor take an inheritance by repreſentation; and it is not ſufficient to entitle a perſon to ſucceed to a Peerage, that in the patent words which exclude him cannot be cited. In that reſpect honours and lands ſtand on footings extremely different. In the caſe of the former, expreſs words which call him muſt be found, but they are not required in that of the latter; becauſe a deſtination, inſerted in a charter of property, is an act of the free will of the proprietor only, who either by himſelf or by commiſſioners obtains the charter; but that contained in a grant of nobility proceeds entirely from the grace of the Crown, whoſe favour cannot here be extended beyond the terms in which his

his Majeſty is pleaſed to give it. An heir-female is not excluded in a grant made to heirs-male, yet is not admitted to the ſucceſſion; and in one made to heirs-male of the *body*, a collateral heir is not expreſsly debarred, but is not in fact allowed to ſucceed. I ſhall not ſay, whether a dignity, beſtowed on a perſon and his *heirs*, goes to his heirs-general, to heirs-female, or even to collateral males, unleſs the patent contain unambiguous expreſſions, which make it clearly deſcendible to thoſe different orders; but a Peerage, granted to a man and his *heirs-male*, ſeems to be limited to the heirs-male of his body, becauſe others are not called to take it, unleſs in the patent be inſerted either the word *whatſoever*, or ſome other equivalent to it, which expreſsly declares it deſcendible to collateral males.

A ſyſtem, perfectly conſiſtent in all its deciſions about them, could it be diſcovered, would not, my Lord, diminiſh the dignity of the auguſt Houſe formed by that exalted order; and it is full time that an end be put to irregularities which tend to contaminate its purity. But it is a firſt and ſacred commandment of law, never to be violated, that every thing, to which a man has a right, be conſtantly allowed to him. A judge, whoſe opinions on the bench are influen-

ced by a partial reſpect to the counſel who plead, to the agents who conduct, or to the parties engaged in a ſuit, is univerſally perceived to be a baſe, a deteſtable villain. Private attachments, perſonal animoſities, political intereſts, ſhould not be carried to that holy place, which ought never to be entered without a pure heart. Even conſiderations of expediency, or reaſons of ſtate, muſt not be intermingled in queſtions of property; and no perſon really poſſeſſed of a good claim to a Scotch Peerage ought, on any pretence, to be deprived of his nobility. It cannot, however, leſſen the attention due to any rule, that the conſequences deducible from it are in themſelves beneficial to the public; and if the theory, ſubmitted to your Lordſhip in the foregoing pages, be inexceptionable in other reſpects, a ſolid objection can hardly be thought to lie to adopting it, that it tends not to increaſe, but to diminiſh the number of that amphibious ſpecies, which, at the ſame time that its members are placed in a ſituation in itſelf exceedingly awkward, becauſe excluded from the capital privilege belonging to their ſtate, ſeems already ſufficiently numerous in proportion to the riches and the populouſneſs of their country, but which, on the extenſive bottom aſſigned at preſent to noble dignities, may be multiplied almoſt without

out end, only to become from poverty and from dependence disgraces to their rank, and burdens on the Crown.

BOOK

BOOK IV.

Additional Observations, which confirm the foregoing Theory.

ALMOST every matter relating to things, whoſe origin, qualities, powers, effects, uſes, and ends, are diſtinctly known, muſt be reducible ſcientifically under determinate laws, derivable from the nature of the objects, with which their appearances may be expected all to be reconcileable. Hence, in England, Peerages were brought to a ſyſtem much earlier than in Scotland; and their deſcent has long been ſubject there to exact regulation. But thoſe titles which were borne in ancient times by the Scotch

nobles, differing eſſentially from themſelves at different periods, are honours ſeemingly anomalous; and many phenomena, irreconcileable to the nature commonly attributed to them at preſent, have been obſerved about them. The theory, which I have now laid before your Lordſhip, accounts in a natural manner for moſt of theſe phenomena, which indeed are hardly explicable on any other hypotheſis; and will be owned to derive a ſtrong confirmation from the entire conſiſtency which it is thereby diſcovered to maintain with itſelf in all its parts.

I. In ancient times it was not uncommon for men to forbear aſſuming titles, to which their claim was unqueſtionable, till they had completed their rights to their eſtates in a proper feudal manner; a delicacy ſeldom, if ever, obſerved after 1587 (*b*). At preſent, his funeral obſequies are no ſooner performed to the laſt poſſeſſor, than the honours are taken by the next heir.

In the year 1292, Duncan Macduff Earl of Fife was a ward of Edward of England, and John de St John was appointed by this Prince to officiate for him at the coronation of Baliol. In the commiſſion granted to St John, Duncan is termed

(*b*) Sup. Caſe, p. 17. 18.—Ad. Caſe, ch. 6. p. 94.—N° 2. 3. 4. of Append. 5th of A. Douglas, Eſq.

termed ſon and heir of the Earl of Fife (*c*). The Earldom was then poſſeſſed by his Sovereign.

John Earl of Sutherland, who died in 1514, is deſcribed in the return of his ſervice (*d*), in the precept iſſued on it from Chancery, and in the inſtrument of the ſeiſin which followed upon them, John Sutherland ſon and heir of John Earl of Sutherland (*e*).

II. The ſtyles which families had long carried were frequently changed by them for others; and theſe variations ſeem to have been made entirely at pleaſure, without either the permiſſion of the Crown, or almoſt any rule directing the alterations.

In a charter granted on the 5th of July, in the 12th of Robert II. Alexander Stewart, a prince of the blood, is ſtyled Earl of Buchan: But in another charter, granted by the ſame King on the

(*c*) Dalrymple's Annals, I. 222.—Rymer, II. 600.

(*d*) Service, a technical term of the Scotch law, ſignifies "a verdict of a jury, impanelled on a brief iſſued out of "Chancery, aſcertaining the perſon who is heir to another "that is dead." The verb, *to ſerve*, is uſed in a correſponding ſenſe. A retour is, "a writ iſſued by the Direc- "tor on the return of the ſervice into Chancery, authenti- "cating the verdict found by the inqueſt."

(*e*) Suth. Caſe, p. 3.4.—Ad. Caſe, p. 13. &c. and ch. 6. p. 146. 147.

the 22d of that month, he is termed Laird of Badenoch (*f*).

Walter Stewart, the conſpirator principally concerned in murthering James I. was at once Earl of Athole, Earl of Strathern, and Earl of Caithneſs; yet in a charter, extant in the Regiſtry, he calls himſelf Lord of Brechin (*f*).

John Stewart Earl of Buchan, a ſon of the Duke of Albany, both ſtyles himſelf, and is ſtyled in the rolls of Parliament as well as in charters of lands, indiſcriminately Laird of Buchan and Earl of Buchan (*g*).

That great family, whoſe power was ſo extenſive on the eaſtern border, and which uſed frequently to take party with the Engliſh, was diſtinguiſhed by the title of Earl of Dunbar, as well as by that of Earl of March (*h*).

The family of Halyburton is deſcribed, even in the rolls of Parliament, ſometimes Lord Halyburton; ſometimes Lord Dirleton; ſometimes Lord Halyburton and Dirleton; ſometimes Halyburton, Dirleton, and Lambden (*i*).

The

(*f*) Dominus.—Ad. Caſe, ch. 5. p. 32. 43. &c. 63.

(*g*) Ad. Caſe, ch. 6. p. 156.

(*h*) Ad. Caſe, ch. 4. p. 43. 69,

(*i*) Ad. Caſe, ch. 6. p. 87.—Inſtances of many other variations might be produced. You will find them ſcattered all

The fiefs belonging to thoſe noblemen were the objects immediately dignified with nobility: Their eſtates, being generally large, conſiſted of many different parcels, each diſtinguiſhed by a proper name: A particular ſtyle was rarely aſſigned or directed to be borne by their owners; but the honour conferred on their lands gave them a right to the generic appellation co-relative to it: And they aſſumed at pleaſure any title, which either ſeemed moſt congruous to their circumſtances at the time of taking it, or perhaps was then moſt agreeable to their fancy.

III. It ſometimes happened that noblemen did not take ſtyles from lands, but were careleſsly denominated, even in formal deeds, by prefixing their Chriſtian names to the proper title of their dignity, without any addition. In old days they were wont to ſay ſimply, Mallis Comes, Murdoc Comes; as in familiar diſcourſe we ſpeak at preſent of Duke James, Marquis John, Earl William(*k*).

In

all through the caſes written on claims to Peerages. See Sup. Caſe, p. 17. 32.—Ad Caſe, ch. 5. p. 28. 32. 38. 43. &c. ch. 6. p. 86. 87. 156.—Crawfurd's Officers of State, p. 44.—Dalrymple's Annals, p. 18. year 1072.

(*k*) Dalrymple's Collections, p. 376. &c.—Anderſon's Diplomata, N° 11. 17. 23. 25.

In other cases they were described by their name and their surname only. Take for an example the Earl of Murray, whom you may find named Archibald Douglas by Pitscottie. His brother, the first Scotchman that was honoured with the Garter of England, but the last of his race that bore the title of Earl of Douglas, is frequently termed, by the same historian, James Douglas (*l*).

IV. In Scotland honours were not supposed to be susceptible of resignation, or, I believe, I ought rather to say that they never were in fact resigned into the hands of the Crown, before the time of James VI. But, after they had been rendered personal in his reign, a contrary practice became very common, and instances may be cited in which dignities were surrendered immediately before the Union (*m*). A surrender of lands, objects which always were resignable, implied a surrender of all the rights incorporated into them. Titles, which had been conferred on estates,

(*l*) Pitscottie, p. 101. 102. 103.—Parl. 1455. ch. 44.—Parl. 1481. ch. 100.—Rymer, II. 1024.

(*m*) Lovat's State of Instances, p. 5. title *Lindsay*.—His Remarks, p. 5. 6.—Ad. Case, ch. 6. p. 137. 149.—Brief, p. 60.—Act (not printed) of Parl. 1707. concerning the Peerage of Gray.—Cases exhibited in 1748 to the House of Peers in behalf of the claimants of the Peerage of Stair.

eſtates, were not only deemed too inſignificant to be ſpecially mentioned, but even imagined to be inſeparable from them. As their poſſeſſors could vary their ſtyles at pleaſure, men were thought to be entitled to lay them aſide altogether, or to diveſt themſelves, without leave of the Sovereign: And, from a confuſion of ideas cauſed by habit, that practice continued long after perſonal Peerages had acquired their proper form, and the cuſtom had thereby been rendered prepoſterous.

V. It proceeded from like cauſes, that noblemen uſed, even after 1587, to include in their ſettlements their honours as well as their lands. Thoſe conveyances, before that æra, had been deviſes rather of eſtates to which dignities were annexed, than of the dignities themſelves; and, therefore, their validity and their effects were limited only by the reſtraints impoſed on alienation by the feudal law: But, after Peerages had been introduced, deeds, by which private perſons directed their deſcent, became incongruous to their nature, and accordingly were adjudged in 1633 to be ineffectual (*n*); yet they continued ſtill to be made (*o*), and were even allowed ſtronger effects than ſimilar acts in analogous caſes.

A

(*n*) P. 308. 309.—11th July 1633, Oliphant v. Oliphant.
(*o*) P. 378. 379. above.—Sup. Caſe, p. 14.

A perſon, called by an entail to ſucceed to an eſtate, cannot be deprived of his inheritance by any diſpoſition made by his anceſtor to diſappoint his chance of ſucceſſion: Even a ſettlement confirmed by a charter and a ſeiſin, authoriſed by a warrant proceeding under the hand of the King, is unable to exclude his hopes. The Crown was not however bound, at leaſt in later times, to accept of reſignations of honours; but on accepting of them the deſtination of a Peerage might be altered by the joint act of the Sovereign and of the Peer in poſſeſſion of the dignity, in terms agreeable to their mutual will declared in writing and approved by the ſame power which could at firſt have modelled its creative grant conformably to them. Strict entails are modern inventions: It was very late before full effect was given in Scotland to the ſevere fetters impoſed by them on property (*p*): By the old law thoſe ſettlements were alterable by the united conſent of the vaſſal and of his ſuperior (*q*): And as deſtinations of honours always are in words and ſeem in form to be ſimple, that rule continued, during a few

(*p*) Stair, B. 2. t. 3. § 43. 58. 59.——Stair's Deciſions, 26th Feb. 1662, the Viſcount of Stormont v. the heirs and the creditors of the Earl of Annandale.—Parl. 1685. c. 22.

(*q*) Craig, L. 2. d. 16. § 20. 21.—Macdouall, B. 2. t. 3. § 137. 160.—Erſkine, B. 2. t. 7. § 5. B 3. t. 8. § 20. 25.

years, to be applied to Peerages, even after heirs of entail had ceaſed to be diſinheritable in the caſe of lands. But, on account of the intereſt of the ſtate in them, the courſe of their deſcent could not be altered without the concurrence of Majeſty.

In patents a power, abſolute or limited, was ſometimes conferred, on the patentee and on his heirs, of appointing the perſons to ſucceed them in their dignities: But this power, entrenching on a tranſcendent prerogative which is peculiarly inherent in royalty (*r*), always was of itſelf invalid or inefficacious; and nominations, made in exertion of it by a ſubject, never were of themſelves entirely perfect, but, to become effectual, required an immediate interpoſition of the Crown either completing them by new grants iſſued in terms of the appointments, or at leaſt confirming them by clear declarations of the royal pleaſure, before May 1707. The kingdom of Scotland and the kingdom of England, in conſequence of the treaty then concluded between them, ceaſed to be: Both kingdoms, by their incorporation, were ſunk in one kingdom of Great Britain: And as Peers of a kingdom which does not exiſt cannot be created, Scotch peerages ceaſed at the Union to be reſignable, the ſucceſſion to them became

 then

(*r*) Blackſtone, B. 1. ch. 7.

then for ever determinate; and the ſeries of heirs, ſubſtituted in the royal grants under which they were reſpectively held at its commencement, could not afterwards be varied by any act either of the King, or of the perſon poſſeſſed of them, or of both.

Sir James Dalrymple, author of "the Inſtitutions of the law of Scotland," was reſtored at the Revolution to the office of Preſident of the Seſſion; and in 1690 King William, whom he had accompanied into England, granted the dignity of Viſcount of Stair to him and to the heirs-male of his body. In 1703, his ſon, John, the nobleman who with diſtinguiſhed ability conducted through Parliament the difficult buſineſs of the Union (*s*), was advanced to the title of Earl of Stair, under a limitation to the heirs-male of his own body and of the body of his father; but, being exhauſted by the anxiety and the fatigue to which that unpopular meaſure had long expoſed him, the Earl died the very night after Parliament paſſed the laſt vote finally approving of the treaty (*s*), leaving three ſons, John, William, and George. In 1707, John, the ſecond Earl, who afterwards became a Mariſchal of the forces of Britain, and commanded them at the battle of

Caſe of Stair.

1690.

1703.

Feb. 1707.

(*s*) Carnwath's Memoirs, p. 93.—Burnet, V. 5. p. 321.—324.

Dettingen, reſigned the honours into the hands of Queen Anne for a new grant to be made in favour of a ſeries of heirs different from thoſe ſubſtituted in the charter beſtowed on his father; and on that reſignation her Majeſty granted a new patent of them, which proceeded on her royal ſignature, to John the patentee and to the heirs-male of his body; on failure of them, to any perſon or perſons, deſcended of James Viſcount of Stair, whom the Earl ſhould appoint by a writing under his hand; next, to his brother William Dalrymple and his ſecond ſon by his wife Penelope Counteſs of Dumfries, and the heirs-male of the body of that ſecond ſon; then, to their third, fourth, or other younger ſon, and the heirs-male of his body, in their order. The patent was ratified by Parliament (*t*). In 1747, the Mariſchal, in execution of the power conferred on him by the patent in 1707, made a deed nominating his nephew, John Dalrymple, eldeſt ſon of his youngeſt brother George, to ſucceed him in his dignities as well as in his lands; and after his death without iſſue, his honours were claimed by James Dalrymple ſecond ſon of William Dalrymple and the Counteſs of Dumfries, as well as by their eldeſt ſon William Earl of Dumfries, and by John Dalrymple the nominee. The charter, paſſed on the

Mar. 31. 1747.

May 9. 1747.

(*t*) Acts not printed of 1707.

the resignation of the Earl in 1707, was admitted to be sufficient to alter the destination contained in the patent of 1703; but the nomination made by the Mariſchal, which could not be ratified by the Crown, after the Union, was declared to be invalid, and the Peerage was adjudged by the Houſe of Lords to James Dalrymple (*u*).

VI. In letters patent, the heirs, for whom Peerages were deſtined, were ſometimes deſcribed after 1587 in the relative and reſtrictive words, *heirs of tailzie and proviſion* either in general terms or in particular lands (*x*); an addition in moſt caſes inſignificant. Settlements of their eſtates, which perſons ennobled make after the date of their patents, cannot influence the deſcent of their honours, becauſe a ſubject cannot confer nobility: And thoſe executed before it muſt alſo be ineffectual,

(*u*) Reſolved and adjudged by the Lords ſpiritual and temporal in Parliament aſſembled, "That the nomination or "appointment, dated the 31ſt March 1747, made by John "late Earl of Stair to his honours and dignities, is not valid "in law; and that the petitioner James Dalrymple has a "right and title to the honours and dignities of Earl of "Stair, Viſcount Dalrymple, Lord Newliſton, Glenluce, "and Stranraer." Journals, 9th—29th March, 4th May 1748. Caſes of the Claimants of the Peerage of Stair.

(*x*) See, in the Acts of Sederunt 27th Feb. 1740, the Caſes of Menteith, Seafield, Oxenfurd, Duplin, &c.

fectual, unleſs perhaps the patent refer diſtinctly to a particular deed, then completed, and containing a ſpecial line of heirs who appear clearly to be intended by the Crown, as otherwiſe thoſe called to ſucceed muſt be held to have been unknown to the Sovereign.

VII. The Court of Seſſion, the ſupreme judicature eſtabliſhed in Scotland to determine in moſt queſtions of property, and inveſted with an excluſive authority to judge concerning landed eſtates, exerciſed a juriſdiction in competitions about peerages. Claims entered to them were held, after, as well as before, the Union, to fall within its ordinary department. In 1730, that court judged in the ſuit brought for aſcertaining the perſon who had right to the Lordſhip of Lovat; and a doubt ſeems not then to have been entertained, either on the bench or at the bar, concerning their power to take cogniſance of the matter. It was only lately that Scotch lawyers were taught to number, among the privileges acquired to the peers of Scotland by the treaty of Union, that of ſubjecting their legal pretenſions to thoſe dignities to the arbitrary deciſion of the Crown.

VIII. In ancient charters, by which lands were raiſed

raiſed to honours, place or rank is ſometimes enumerated among the pre-eminences implied in them; and the terms uſed in thoſe deeds, however apt in ſome caſes to be miſunderſtood at preſent, will conſtantly be found, if attentively conſidered, to mean no more than precedency or degree. A ſeat in parliament, an object in itſelf little valued, as well as implied in every freehold, I dare not aſſert poſitively, I believe however, was never given or expreſſed. But, after Peerages had been disjoined from fiefs in 1587, a right to ſit and to vote in that aſſembly, as well as a title correſponding to their dignity, began to be expreſsly conferred; even in charters granted for re-inveſting their owners in eſtates which had already been ennobled, no leſs than in thoſe by which nobility was originally beſtowed on them; eſpecially in caſes in which either the heir was not deſcended from the nobleman who had poſſeſſed the Peerage in 1587, or his ſucceſſion was not entirely exempt from objection.

In a charter granted in 1591 to James Hay of Yeſter, who had ſucceeded his brother William Lord Hay in the Lordſhip or eſtate of Yeſter, both a vote and the dignity are given to James (*y*).

Another charter, by which James VI. in 1595

(*y*) See notes [M and N] at the end of the volume.

granted the Earldom or eſtate of Athole to Lord Innermeath, is couched in ſimilar terms (*z*).

Mary Douglas, ſtyled Counteſs of Buchan, married James Erſkine, a ſon of the Earl of Marre, who, according to the courteſy ſtill prevalent in his time, aſſumed the title of Earl of Buchan; but, as his pretenſions to this dignity, and even thoſe of his wife, were not perfectly inexceptionable, the rights pertaining to it were expreſsly conferred on himſelf, and his heirs-male, in a charter of the Earldom given in their favour by the King in 1617 (*a*).

IX. PATENTS, by which Peerages diſconnected from lands, or Peerages only, are granted, and by which they may be beſtowed on perſons not poſſeſſed of a perch of ground, were not uſed in Scotland before the days of James VI. (*b*). Before 1587, they were not neceſſary to the acquiring of ſeats in parliament; perhaps were not conſtitutional modes of arriving at them.

X. BEFORE his reign many ſuits were brought there about eſtates, noble as well as ignoble, and about other ſorts of property: But, in the whole annals

(*z*) P. 322. above.

(*a*) See note (N) at the end of the volume.

(*b*) P. 132. above.

annals of Scotch juriſprudence, your Lordſhip will not find a ſingle competition about a Peerage, or even a title, before thoſe which were brought in the Court of Seſſion in 1633 concerning the dignity of Oliphant and the Earldom of Strathern (*c*).

XI. It ſeems to be certain, that an order of nobility, diſtinguiſhed by the title of Lord, exiſted anciently in Scotland (*d*); and that people were advanced to this degree, either by erecting their eſtates into Lordſhips (*e*), or by inveſtiture performed in parliament. Nevertheleſs, it is not unlikely that the rank, as well as the title, was ſometimes aſſumed ſpontaneouſly without any authority, except courteſy, acquieſcence, cuſtom, and acknowledgement.

The title, or rather the appellative, DOMINUS, LORD, does not always ſignify a nobleman, but ſeems, of old, to have been allowed to every owner of land (*f*). The word LAIRD, by which you

(*c*) Durie's Deciſions, 20th—22d March 1633.

(*d*) Parl. 1483. c. 108. § 3.—Parl. 1488. c. 2. 3.—Parl. 1493. c. 72.—Parl. 1540. c. 56. 57. 62.

(*e*) Charter of the Lordſhip of Hamilton, cited p. 280. above.—See p. 121. above.

(*f*) Parl. 1424. c. 14. 19. 22. 30. 37.——Parl. 1429. c. 133.

you mean a proprietor of ground, is only Scotch for Lord (*g*). Dominium denotes an eſtate as well as a Lordſhip (*h*): And in Latin mere Lairds are often deſcribed in terms exactly the ſame with noble Lords (*i*). Hence it cannot always be affirmed with aſſurance, that in every caſe in which an eſtate is termed a Dominium, its owner was a nobleman; and it is ſometimes difficult to diſtinguiſh the Domini who were noble from thoſe who were only commoners.

Lords were commonly deſcribed by placing their title, DOMINUS, immediately before their ſtyle, and after their Chriſtian name; and Lairds, it

c. 133. 140.—Parl. 1449. c. 17.—Parl. 1457. c. 89—Parl. 1469. c. 44.—Parl. 1474. c. 73.—In the liſt of the jurymen who ſat on the trial of Lord Lyle, John Drummond of Stobhall is deſcribed Dominus de Stobhall. See note (O) at the end of the volume.——Form of Baron Courts, c. 26. 30. 32. 58.

(*g*) In the Scotch dialect, *a*, or *ai*, is often pronounced and written for *o*, or *oa*. They ſay Pape, and Paipe, for Pope; aith for oath; ſaire for ſore; aits for oats; haime and hame for home.

(*h*) Charter, 1370, of the Earldom of Roſs, cited in Suth. Append. N° 3.—Ad. Caſe, ch. 5. p. 27.—Precept, 1516, and charter, 1525, cited in Ad. Append. p. 3.—— Charter of Levenax, 1385, cited in Ad. Caſe, ch. 5. p. 41. —Parl. 1455. p. 36.

(*i*) Lovat's Mem. p. 18. 19.—Mackenzie's Anſwers to it, p. 18. 19. 22.—Mackenzie's Inform. p. 3. 5.

it is said, were distinguished by inserting the preposition DE, OF, between their style and the word DOMINUS subjoined to their name (*k*): Forms which are abundantly distinct; but they seem not (*l*) to have been constantly observed.

In Scotland it was common for the Lairds to take styles from their lands, and they were both described and addressed by those styles (*m*). Lindsay, the historian of the Jameses, is best known under the appellation of Pitscottie: Drummond, author of the droll macaronic poem, Polemo-Middinia, is commonly named Hawthornden. Their wives, too, were denominated LADIES; and the styles, or names of the estates, of their husbands, were subjoined immediately after that title; fashions which are not yet entirely obliterated.

Barony and Baron are often synonymised by Lordship and Lord (*n*): But, in the Scotch statutes, after the year 1587, you hardly meet with a single instance in which those orders are confounded with each other.

In

(*k*) Keith, p. 216. 222. 226. 305.——Essay, HONOUR, DIGNITY.

(*l*) Keith, Append, p. 18.—Fordun, l. 16. c. 10. 11.—Major, l. 6. c. 12.—Rymer, X. 688. 695.—Compare Parl. 1572. c. 1. with Parl. 1579. c. 2. 27.

(*m*) Parl. 1704. c. 4.

(*n*) Parl. 1503. c. 128.—Form of Baron Courts, c. 25. 32. 35. 61.

In conſequence of the laws, which granted a diſpenſation from attendance in parliament to thoſe freeholders whoſe eſtates amounted not to the value ſpecified in the acts, a diſtinction was introduced between the great Barons and the ſmall Barons. "All were accounted great Barons," ſays Stair, "who held an hundred marc land, or "above, of the King; and the reſt meaner Ba-"rons (*o*):" And in a ſtatute no older than 1540, ſuch as poſſeſſed a hundred pounds of yearly rent are denominated Great landed Men (*p*). The faces of thoſe who were enabled, by fortune, to attend regularly, were rendered by acquaintance familiar in that aſſembly: The doors would more readily be thrown open at their approach: More reſpect would naturally be ſhewn them: A cloſer connection ſeemed thereby to be eſtabliſhed between them and the houſe; and from the ſuperior frequency with which they were beheld in conjunction with it, they came to be thought to poſſeſs a ſtronger right to ſeats than others whoſe appearance was rare in the ſenate.

The title commonly given to thoſe who ſit in conventions of dignity, to which a great number, if not a conſiderable majority, of the members were entitled by cuſtom, would naturally accompany

(*o*) B. 2. t. 3. § 2.
(*p*) Parl. 1540. c. 57.

pany them out of court. All who attended were, in general, denominated by one common appellation, Lords of Parliament (*q*): And it is not improbable, that, from the long poſſeſſion attained in that manner, ſome Lords, whoſe right had originated in uſurpation, arrived at laſt at a firm hold of nobility.

Craig, an eminent lawyer, who was born forty years before 1587, and who, probably, at an early age, was the Deputy Juſticiary that in 1567 preſided at the trial of the murderers of King Henry, aſſigns to this order an origin exceedingly ſimilar to that here given (*r*).

Several

(*q*) Parl. 1434. c. 153.—Parl. 1452. c. 38.—Parl. 1455. c. 52. p. 36.—Parl. 1467. c. 33.—Parl. 1471. c. 53. 54.—Parl. 1488. c. 14.—Pitſcottie, p. 27.

(*r*) Quæret aliquis unde hæc vox, Lords, derivata ſit, quemque locum dignitatis in republica habeat? Sane hi a principio nihil niſi Barones erant, nec adhuc ſunt. Nomen tamen hinc provenit, quod cum jure regni omnes Barones publicis comitiis intereſſe tenerentur, nec tamen cum intereſſent, propter multitudinem, omnium ſuffragia colligi poſſent, ex ſingulis provinciis unus aut duo eligebantur, qui publica regni negotia cum rege tractarent; et in initio digniores, et rerum tractandarum peritiores deligebantur, qui etiam Domini ſalutabantur. Sed degenerantibus ſeculis, cum comitia eſſent frequentiora, nempe in quibus magna pars cauſarum decideretur, nec tenuiores in ſumptus ſufficere poſſent, factum eſt ut potentiores pro peritioribus ſubſtituerentur.

Several noblemen, whoſe perſons appear not from record to have been ennobled by inveſtiture, and whoſe eſtates ſeem not to have been erected into Lordſhips, are found bearing the denomination correſponding to that degree. Perhaps the honours of Borthwick and of Lovat were gradually acquired from this ſource.

The order of Lords was later of being imported into Scotland than that of Earls; probably not till the reign of James I. Domini are not enumerated among thoſe who, in ancient times, were either ſummoned to Parliament (*s*) or attended in it: And none of them can carry their antiquity higher than the acceſſion of that Prince.

The tenth chapter of the ſixteenth book of Fordun ſeems to be the firſt paſſage of any old author, in which the different degrees of nobility are

rentur. Quod ſi Comitia prorogabantur, etiam durante tota vita hi potentiores dignitatem retinebant: Sic etiam finitis Comitiis (ut pronum ſemper humanum genus in adulationem eſt) Dominorum nomen retinebant, et iis vita functis, heredes, cum eandem potentiam haberent, ægre etiam a ſe nomen dimittebant. Sic progreſſu temporis factum, ut qui prius Commiſſarii tantum Baronum eſſent, in Dominorum numerum, quoties publica Comitia indicebantur, ſint cooptati. L. 1. d. 12. § 18.—See title prefixed to the acts of the third parliament of James I. quoted p. 345. above.

(*s*) See note (A) at the end of the volume.

are accurately distinguished from each other (*t*). There you find a list of the jurors who were impanelled on the trial of the Duke of Albany, and the Lords are distinctly separated both from the Earls and from the Knights. Those termed Domini could not mean Lairds, as the whole jury consisted of landed men.

XII. HENCE a conjecture may be formed about the way in which the judges of the Court of Session were led to assume styles and titles as if they had been Lords Baron. This court, instituted by Parliament in 1532, succeeded to that moveable tribunal, which had consisted of those termed Lords of Session, or Lords of Council. In the statutes erecting it the title of Lord is given to the senators who compose it (*u*): The judgements pronounced by them are all made under the laconic denomination of THE LORDS: Some addition to that title was necessary to distinguish them from each other: Most of them were possessed of landed estates: And it was not unnatural, for this purpose, to add immediately after their title the style by which, according to the fashion of the nation,

(*t*) See note (O) at the end of the volume.

(*u*) Hawthornden, p. 256.—Parl. 1457. c. 68. 70.—Parl. 1491. c. 56.—Parl. 1503. c. 92.—Parl. 1532. c. 6. § 5. 6. 7. 8. 12. 14. 15. 16. 18. 19. &c.

tion, they had been commonly called before their preferment; juſt as in England the furname of each judge is added at preſent to the word Juſtice or Baron. An appellation, then unimportant and not even vain, I will not ſay durſt not be refuſed in a narrow country, but would not be envied to wealthy men raiſed to their arbitrary ſtation (*x*). In the records of the College, a ſtyle is aſſigned to the Preſident as well as to the other Lords; but he is not addreſſed or commonly known by it: His appellation both in court and out of it is Lord Preſident; a proof, that this denomination was imagined to import more dignity than a title, which would now ſeem higher, but which was then hackneyed by every Laird from John-O'-Grot's-Houſe to the Mull of Galloway.

XIII. Not only were commoners both addreſſed and deſcribed in converſation by the names of their lands: It was not unuſual for them to ſign letters and even deeds by their ſtyles; a practice

(*x*) Parl. 1457. c. 70.—Parl. 1532. c. 6. § 1. 4.—Buchanan, l. 14. c. 43.——See Leſlie, ad an. 1532—1533.—Stair, B. 4. t. 1. § 52. 53. 54. 55. &c.—Macdouall, B. 4. t. 7. § 15.—Erſkine, B. 1. t. 3. § 20.—Dirleton's Doubts, word *Seſſion*.—Acts of ſederunt, 17th June 1674, and 25th Jan. 1676.

tice which was not prohibited, till in 1672 a ſtatute declared (*y*) it lawful only for noblemen and for biſhops to ſubſcribe by their titles.

BLAIRQUHAN, MOCHRUM, JOHNSTON, LOCHINVAR, BOMBY, and many other commoners, are found among thoſe who, having deprived Queen Mary of the Scotch crown, and having committed her priſoner in the caſtle of Lough Leevin, entered in 1567 into a bond, by which they engaged to ſupport the authority of her infant ſon, whom they had raiſed in her room to the throne (*z*)

During her impriſonment, her exquiſite beauty and elegant accompliſhments made on the youthful heart of George Douglas, a brother of the owner of that fortreſs, a deeper and more powerful impreſſion than other ſtrong and intereſting ties (*a*), and it is not improbable that by acceptable ſervices a mutual paſſion had been engendered for him in the unreſiſting breaſt of the Queen. It was by the aſſiſtance of young Douglas

(*y*) Parl. 1672. c. 21.

(*z*) Appendix to Crawfurd's Officers of State.—Keith, p. 434.—Anderſon's Collections, v. 2.—See alſo Keith, advertiſement, p. 10.

(*a*) George Douglas was a brother, by the mother, of Murray the Regent.

glas that next year she effected her escape (*b*). On her arrival at Hamilton, after this deliverance, a deed similar to the former was executed by her patizans, and among the subscribers of it are found BASS, ROSLIN, BALWEARY, CLACKMANNAN, INNERWICK, and many others of their order (*c*).

The famous obligation, emphatically termed, on account of the awful engagements contracted in it, the solemn League and Covenant, which, Hume (*d*) says, all ranks, conditions, ages, and sexes flocked to subscribe, was also signed by many commoners, DUNLOP, BISHOPTOWNE, FULLERTON, ROWALLAN, with their styles only. The violences consequent on that formidable association are well known: And the commission, which was granted in 1640 by a committee of Parliament to commissioners to treat, first at Rippon, and afterwards at London, on the part of Scotland, with commissioners nominated on behalf of England, was signed, after the same fashion, by RICCARTON, CAPRINGTON, GAITGIRTH, DUNDAS, all commoners (*e*).

XIV.

(*b*) Burnet, v. 1. p. 44.
(*c*) Keith, p. 476.
(*d*) Hume, ch. 53.
(*e*) Parl. 1641. c. 6.—Hume, ch. 53.

XIV. Barony, Lordſhip, Earldom, are denominations which aſcend gradually above each other. Nevertheleſs, the ſame proprietary juriſdiction and feudal privileges are implied in all of them (*f*); and, as they differ only in name, your Lordſhip will often find them mentioned in ancient charters and even in ſtatutes, as if little or no diſparity had intervened between them. Almoſt every Barony is alſo termed a Dominium, even ſometimes Earldoms are, as if the terms had been ſynonymous (*g*): Yet it is certain that Baronies were often incorporated into Lordſhips, that Earldoms were erected out of both, and that eſtates were underſtood to be thereby exalted in rank and in denomination.

XV. In Scotland a nearer approach in dignity was always made to the nobles by the inferior holders of land than in other countries. Even in modern ſtatutes Knights, and Barons, and landed men, are denominated Noblemen (*h*).

(*f*) P. 113. 114. 115. 127. above.

(*g*) Parl. 1503. c. 128.—Lovat's Ad. Cond. p. 8.—His Inform. p. 3. 5. 25. 26. 32.—His Remarks on Mackenzie's Inform. p. 4. 5. 19.—Precept (1516) and charter 1525, cited in Suth. Append —Ad. Caſe, ch. 4. p. 57. ch. 5. p. 27. 28. 41. ch. 6. p. 99.—Sup. Caſe, p. 18.—See note on p. 113, 114. above.

(*h*) Parl. 1540. c. 57. 80.

The fine originally impoſed on each member who neglected to attend Parliament was ten pounds Scotch, without diſtinction either of rank or of eſtate (*i*). In 1587 that penalty was increaſed to a hundred marcs on a Burgeſs, a hundred pounds on a Prelate, two hundred pounds on a Lord, and three hundred on an Earl; but in the ſtatutory words of the act, eſtabliſhing the alteration, no mention is made of freeholders, or even of Barons. Either from the rarity of their appearances in that convention, they had been entirely forgotten, (a ſuppoſition contradicted by the preamble of the ſtatute), or they were included under the deſcription of Lords; a proof that little diſtinction was then made between theſe different orders. Accordingly, LORD OR BARON, notwithſtanding that they are not convertible terms, are the words uſed in the firſt line of that law (*k*). But, in 1617, thirty years after inelective ſeats had been beſtowed on the Peers, and counties had become obliged to ſerve by repreſentatives, an act was paſſed, impoſing on commiſſioners of Barons a mulct of a hundred pounds for abſence (*l*). A like diſtinction is found in ſubſequent ſtatutes (*m*).

XVI.

(*i*) See note (A) at the end of the volume.
(*k*) Parl. 1587. c. 34.—Parl. 1457. c. 91.
(*l*) Parl. 1617. c. 7. (*m*) Parl. 1690. c. 1.

XVI. People engaged in active life, especially if raised by good fortune to envied stations, assuming superior airs ill becoming their childish understandings, are apt, from ignorance and from vanity, to affect an insolent contempt of abstract observation, whose depth, piercing to the remote and primary causes of political customs and institutions, they are often disabled by their own shallowness fully to penetrate: Yet the influence of the imagination, in giving stability to government, and in ensuring submission to its decrees by inspiring a reverence for the persons who administer it, is a fact completely attested by experience, indeed obvious to the most heedless observer. All dominion, the most despotic and the most military, no less than the most free and the most popular, says a profound writer, is ultimately founded not on force, which, even in the case of armies, is always lodged in the many, but on fancy or opinion, operating on them in favour of the few. Hence splendid robes and grotesque dresses make no mean figure among those cunning contrivances which, in almost all ages and in all nations, have been employed by kings, by priests, by magistrates, and even by judges, to excite astonishment, to confound reason, and to inspire awe in the minds of the people who be-

hold them (*n*). In the Scotch Parliament, peculiar robes were worn on ſolemn occaſions by each eſtate. In 1455 brown mantles, with little hoods to recline on the ſhoulders, open before, lined with white fur, and faced with it a hand-breadth broad down to the belt, were aſſigned to Earls: The other Lords of Parliament were appointed to be arrayed in red mantles, with red hoods, open before, either lined with ſilk, or furred with a border purled of criſty gray Greece or purray (*o*): And burgeſſes were ordered to wear blue cloaks, with blue hoods, furred a foot deep, with an open on the right ſhoulder alſo furred. No garb is given there to the Barons or to the Freeholders (*p*).

Another ſtatute, ratifying that made in 1455, was paſſed in the year 1457; and the parliamentary robes are ordered by it to be faſhioned after patterns which the Sovereign was authoriſed to

(*n*) Parl. 1609. c. 8.

(*o*) The words of the act are, "criſty gray grece or "purray." Their meaning, or the objects intended by them, I have not been able to diſcover: But a conjecture may be formed about ſome of them, from an account rendered in 1474 by the Biſhop of Glaſgow, then High Treaſurer of Scotland, of which a copy is given in Maitland, p. 322.—See alſo Parl. 1429. c. 133.—"Chriſt's Kirk on "the Green," a ſong aſcribed to James I.

(*p*) Parl. 1455. c. 52.

to provide. The only perſons mentioned there are Earls, Lords of Parliament, Commiſſioners of Boroughs, and Men of Law (*q*): But it cannot be ſuppoſed that an ornament, allowed to burgeſſes, was intended not to be beſtowed on proprietors of land.

In 1587, different garbs, agreeable to the patterns which probably had then been prepared, were again ordered to be uſed by the three eſtates; and from the expreſſions, however inaccurate, employed in the act paſſed on this occaſion, one ſhould conclude, that only three different models had been formed, and that all the individuals belonging to each eſtate, whether noblemen or commoners, had been apparelled preciſely after the ſame faſhion.

Theſe repeated injunctions, enforced as they were by the impoſition of penalties, and even by threats of excluſion, ſeem never to have been carried into full or exact execution. Robes were at laſt got by the nobility: The Dukes and the Earls, as well as the Lords, wore ſcarlet, ornamented with bars of ermine; a Duke with five, an Earl with four, a Lord with three: But no diſtinct habit was ever aſſumed by the Burgeſſes, or even by the Barons (*r*).

(*q*) Parl 1457. c. 76. (*r*) Mackenzie's Obſerv. on Parl. 1455. c. 52.—and Parl. 1587. c. 36.

XVII. Among the Romans, a man, whoſe fortune entitled (*s*) him to a horſe, was placed by the conſtitution in a rank ſuperior to the populace; and Footman is the name uſed by the Greeks for a ſlave (*t*). In Scotland, neither ability to maintain, nor the fact of keeping a horſe, marked any order of the citizens; but a more juſt, and even a more political rule took place. Every perſon who, with money earned by induſtry or acquired by ſucceſſion, could afford it, was allowed that conveniency: And in the Scotch armies, almoſt all who could obtain it were wont to perform their marches carried on that animal. The deſtruction cauſed to the crops on the ground by the multitude of horſes which were brought to the field, and the confuſion and incumbrance created in the hoſt by their number and unwieldineſs, together with the difficulty often found in ſubſiſting them, at laſt obliged that important article to become an object of parliamentary regulation. In 1540, every individual was ſtill permitted, by a ſtatute, to ride to the place at which the troops were required to aſſemble: But all the ſoldiers, officers as well as privates, were ordered on their arrival at the rendezvous, to return their horſes, and to proceed on

(*s*) Tit. Liv. I. 43.—Sueton. in Cæſar. 33. in Auguſt 40. —Plin 33. 2. (*t*) Ανδραποδον.

on foot. Some indulgence, however, was granted to a few, on whom this hardſhip was reckoned improper to be impoſed; and Barons, or great landed men, were permitted, as well as Earls and Lords, to march on horſeback (*u*). A ſimilar diſtinction was made in the weight and the ſplendour of their harneſs, and perhaps in the nature and the kind of their weapons (*x*).

XVIII. In inexperienced times, a few years before 1587, people, whoſe income amounted not to two thouſand marcs, or fifty chalders of corn, clear a-year, were forbidden among us by legiſlature to wear gold, ſilver, velvet, ſatin, damaſk, taffatas, embroidery, fringes, lawn, cambrick, or even woollen imported from foreign countries. Knights, however, and landed gentlemen, as well as Dukes, Earls, and Lords, of adequate fortunes, were allowed theſe fineries (*y*).

XIX. Of all the inventions of vanity, perhaps the moſt frivolous are armorial enſigns; but, conſidered in a philoſophical view, they afford to profound thinkers, who delight to examine the mechaniſm of the mind, a curious example of that

(*u*) Parl. 1540. c. 56.
(*x*) Parl. 1540. c. 57.— St. Wil. c. 23.
(*y*) Parl. 1581. c. 18.

that powerful principle termed Aſſociation of Ideas, by which thought is continually led in its progreſs, and one image preſents to the fancy another which has been diſcovered by experience, or which is ſuppoſed from habit, to be connected with it. Theſe badges, being intended to diſtinguiſh perſons by whom martial atchievements or noble deeds had been performed, it is probable, were originally perſonal, and were adorned, perhaps, with deſigns or emblems ingeniouſly expreſſive of the actions which had procured them; but, forming a part of the eſtates of the perſons who had obtained them, and at their deaths paſſing to their heirs, they at laſt became relics, reſpected and precious, which, connecting their poſſeſſors with thoſe on whom they had been beſtowed, men would be proud to diſplay: And they would be carefully preſerved on that account, as the fancies of thoſe to whom they were ſhown, as well as of thoſe to whom they pertained, would be conveyed by them, with quickneſs and with vivacity (z), to the perſons who had atchieved them. Arms came thereby to be converted into marks of deſcent; and obſcure hieroglyphics were gradually ſubſtituted for ſolid inſtruments adorned for ſhow, but made for uſe. Hence ranks, as well as pedigrees,

(z) P. 230. 231. 232. 275. 276. above.

digrees, were diſtingiſhed by fanciful conceits; and a jargon, adapted by its myſterioufneſs and by its harſhneſs to puzzle and to amaze, was invented to expreſs its vain enigmas.

In England, the technical terms, employed in Heraldry to expreſs tints, riſe with the rank of the perſons to whom they are aſſigned. The coats of noblemen are blazoned there with precious ſtones; topaz, pearl, diamond, ruby, ſapphire, emerald, amethiſt, jacinth, ſardonix: Thoſe of Princes by the great luminaries of heaven; Sol, Luna, Saturn, Mars, Jupiter, Venus, Mercury, Dragon's head, Dragon's tail: But this diſtinction is not obſerved in Scotland. Among us, in blazoning the arms of the gentry, the ſame language has always been uſed as in deſcribing thoſe of the nobility (*a*).

XX. The arms of thoſe who were admitted to engage at tournaments, during the time they were ſuſpended in expectation of challenges, were attended by Eſquires; they were alſo diſplayed ſome time before the encounter, to vouch the rank of their Lords; and, at advancing to combat, they were carried by Squires, who marched by the ſides of the combatants. Supporters, a badge eſteemed peculiarly honourable among

(*a*) Mackenzie, ch. 4.—Niſbet V. i. ch. 4.—Guillim.

among thoſe learned in heraldry, are limited, by the Doctors in that vain ſcience, to perſons who either are noble in the ſtrict ſenſe of this word, or at leaſt are advanced to honours which require, that, at their inſtallation, they be conducted to the Sovereign by two perſons of like high quality. But, in Scotland, many commoners, not poſſeſſed of either title, carry their arms ſupported by bearers. Not only are the chiefs of names all poſſeſſed of that patent mark of ſuperior dignity; ſeveral inferior families have been prompted, by a mean vanity, to aſpire to an empty honour, which, with them, can only ſerve to make ſpectators recollect that their birth denies them pretenſions to it (*b*).

XXI. In moſt countries, thoſe elevated by their high rank into hereditary counſellors, and even Peers of the Crown, have been diſtinguiſhed above inferior orders by an ornament reſembling the diadem of royalty: But in Scotland the nobility ſeem not, in ancient times, to have been diſcriminated from the commons in that manner. In old regiſters, in old ſeals, in old buildings, the arms, even of Earls, are not embelliſhed with coronets; a diſtinction which probably was not aſſumed by them before the days of James V: And

(*b*) Mackenzie, ch. 31.—Niſbet, V. 2. p. 4. ch. 7.

And it was only in 1665 that theſe embelliſhments were granted to Lords (*c*).

XXII. DURING the reign of Charles II. the Scotch Parliament, infected by a narrow ſyſtem, made an act (*d*), reſtraining the expences of marriages, of baptiſms, and of burials. Lord Fountainhall, whoſe reports are full of anecdotes, after relating, in the ſtrictures left by him on that Parliament, that the noblemen, offended becauſe the biſhops wives in the bill had been termed Ladies, reſolved, in order to teach them humility, to ſuffer their ladies to be termed wives, takes notice, that an altercation aroſe in the Houſe about allowing the funerals of the ſmall Barons to be attended by an equal number of mourners as thoſe of the great Barons; and that on this occaſion Mackenzie, the antiquary, who was afterwards created Earl of Cromarty, but who was then a commoner, replied in a heat, "That the Lords ought to remember they were all ranked in one ſtate; and that himſelf had, under the great ſeal, a right to bury under a canopy (*e*).

XXIII.

(*c*) See a regiſter of arms, done by Sir David Lindſay of the Mount, Lion King at Arms, in 1542.—Mackenzie, c. 30. —Niſbet, V. ii. p. 4. ch. 8.

(*d*) Parl. 1681. c. 14. (*e*) V. 1. p. 153.

XXIII. In Scotland a greater equality was always maintained between the gentry and the nobility, than in other countries in which ranks were more early diſtinguiſhed with an exact preciſion. Landed gentlemen deemed themſelves, and were even held by law, little inferior to Peers; and that parity diſcovered itſelf in articles more important than any which have hitherto been mentioned.

Among the artifices employed to maintain ſuperiors in their authority, and vaſſals dependent upon them, the feudal law inveſted Lords with a power of controlling thoſe, who held lands of them by military tenure, in an article in itſelf uncommonly delicate to every mind of ſenſibility, and important indeed to the happineſs of life. A ſuperior was legally entitled to offer a woman in marriage to his vaſſal; and the vaſſal, if he married another after a requiſition had been formally made on him, forfeited to his Lord double the portion which it might reaſonably be ſuppoſed he ſhould have got by his wife. This barbarous cuſtom was plainly calculated, among other things, to reſtrain feudatories from contracting alliances with families at enmity with thoſe of their Lords (*f*), and was tolerated in North Britain till the ſpecies of tenure which implied

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(*f*) Reg. Maj. l. 2. c. 48. § 6.

plied it had been abolished by legislature in 1747(*g*): But its brutality was somewhat mitigated even in ancient times, because the superior, in order to be entitled to the incident, was bound to offer a match of which it would not be beneath his vassal to accept. Equality was estimated here not by fortune, but by rank and by quality, and all freeholders were held equally noble. It was not accounted any disparagement to offer the daughter of a commoner, possessed of property in land, to an Earl or even to a higher dignity. A gentleman's daughter was reckoned a match for a Peer, and it was not imagined that either his blood would be contaminated, or his dignity would be affronted, by that connection (*b*).

XXIV. In England, a Lord, spiritual or temporal, who, in travelling at the royal command, passes through any forest belonging to the King, is entitled both in going and in returning to kill one or two of the deer(*i*); a privilege transcribed into our regulations concerning forests, which are sometimes

(*g*) 20mo G. II. c. 50.

(*b*) Craig, L. 2. d. 21. §. 25.—Stair, B. 2. t. 4. § 59.—Macdouall B. 2. t. 4. § 59.

(*i*) Blackstone, B. 1. ch. 2. § 4.—Barrington's Observations, Charta Forest. ch. 10. p. 34.

ſometimes aſcribed to William the Lion, but do not perhaps form an authentic part of the Scotch laws. That right, if ever enjoyed by any in Scotland, is granted in them to commoners whoſe eſtates are raiſed to baronies, as well as to Biſhops and to Earls (*k*).

XXV. The Scotch nobility never arrived at ſeveral diſtinctions which are now held to belong to their order. Noblemen, as well as commoners, were obliged to attend the judges on their circuits (*l*): It was not till the year 1710 that they were diſcharged from performance of this obligation (*m*). They were even bound, in the character of freeholders according to their tenures, to give ſuit and preſence in the head courts of the ſheriffs of their counties (*n*), perhaps under an honorary exception made in an old ſtatute (*o*) in favour of Biſhops, of Abbots, and of Earls, who were permitted to attend by their ſtewards.

XXVI. In ancient times, the heirs apparent of

(*k*) Leg. Foreſt. c. 14.

(*l*) Stat. Wil. c. 2. § 1.—Treatiſe of Crimes, (annexed to Reg. Maj), Title, *Juſtice Air*, T. 9. ch. 17. 18.——Parl. 1489. c. 33.—Parl. 1587. c. 82.—Keith, p. 198. 199.—Skene, word *Iter*.—Qu. An. c. 79.—St. Dav. II. c. 9.

(*m*) 8vo Annæ, c. 14.

(*n*) Parl. 1429. c. 144.—Parl. 1540. c. 41.

(*o*) Stat. Wil. c. 2. § 3.

noblemen were not diſcriminated, according to the ranks of their fathers, by the title of Marquis, of Earl, of Viſcount, or of Lord, but were commonly diſtinguiſhed by the appellation of MASTER. The Earl of Arran, ſon of the Duke of Chatelherault, who was Regent during the minority of Queen Mary, ſeems to be the firſt that in Scotland aſſumed a denomination of Peerage. Murdoc, ſon of the Duke of Albany, appears indeed, in England, to have ſometimes been termed Earl of Fife (*p*); but, though a prince of the blood, even he was oftener denominated Maſter of Fife, or ſimply Murdoc of Fife (*q*): And the old faſhion continued long after the beginning of the ſeventeenth century (*r*).

XXVII. BEFORE 1587 the eldeſt ſons of noblemen were not diſabled, more than thoſe of commoners, to ſit in the legiſlative aſſembly. Among the members who ſat in 1560, your Lordſhip will find the Maſter of Mariſchal, the Maſter of Glencairn, the Maſter of Lindſay, the Maſter of Sinclair (*s*). But, after the conſtitution of Parliament had been reformed in that year, the con-

E e ſequences

(*p*) Rymer, IX. 2. 286.
(*q*) Rymer, IX. 48. 125. 244. 250.—Fordun, l. 15. c. 14.
(*r*) Pitſcottie, p. 356. 368. 379.—Parl. 1488. c. 8.
(*s*) Keith, p. 146.

ſequences of repreſentation, the nature of Peerages, and their diſtinction above the rights of commoners, diſcloſed themſelves by degrees, and a diſability was impoſed, from the nobility of their fathers, on the eldeſt ſons of Peers. Hence, on the advancement of Sir George Mackenzie to the dignity of Viſcount of Tarbat, a writ was iſſued in 1685 to the freeholders of Roſs-ſhire to elect another commiſſioner in room of his ſon, who had been incapacitated by that promotion. In the convention of eſtates, Lord Livingſton, eldeſt ſon of the Earl of Linlithgow, was on that account adjudged in 1689 incapable to repreſent the borough of Linlithgow; and William Higgins a ſchoolmaſter, who afterwards became miniſter of Tweedſmoor in Tweeddale, was found to have been duly elected (*t*). In 1708, Lord Johnſton, eldeſt ſon of the Marquis of Annandale, was appointed commiſſioner for the county of Linlithgow, and Lord Haddo, eldeſt ſon of the Earl of Aberdeen, was choſen to repreſent Aberdeenſhire: But, after a full argument on their eligibility, a motion was made in the Houſe of Commons, "That the eldeſt ſons of the Peers of "Scotland were capable, by the laws of Scotland "at

Dec. 3. 1708.

(*t*) Records of Parl. 23d April 1685.—Records of Parl. 18th March 1689, cited in the Journals of the Houſe of Commons, 27th Nov. 1708.

" at the time of the Union, to elect or be elected " commiſſioners for ſhires or boroughs to the " Parliament of Scotland; and, therefore, by the " treaty of Union, are capable to elect or be " elected to repreſent any ſhire or borough in " Scotland to ſit in the Houſe of Commons of " Great Britain;" and a queſtion put on this motion paſſed in the negative. Next day, new writs were ordered for electing other commiſſioners in room of thoſe noblemen (*u*). Dec. 4, 1708.

XXVIII. It is a maxim eſtabliſhed in the feudal law, that all criminals muſt be tried by their equals; but either the nobles of Scotland were deprived of that right, or landed men were held to be fully their peers. Not only were they triable for crimes by the ordinary judges by whom other offenders were tried; the perſons impanelled on their juries were not required to be noblemen. In the trials of the Duke of Albany, of the Earl of Lennox, of Lord Lyle, of the Earl of Bothwell, of the Earl of Morton, of the Earl of Gowrie, of Lord Balmerino; in all the trials of noblemen with which I have met, commoners are found on the inqueſts (*x*).

(*u*) Journals of the Houſe of Commons.—Scot's Hiſtory of Scotland, p. 746.

(*x*) See note (O) at the end of the volume.

XXIX. The privileges of Peerage ſeem to have been wholly unknown in Scotland. At the Revolution the Scotch Peers had not yet attained an immunity from arreſts. Conceptions, indeed, both more correct and more lofty than could be entertained by a people who, till the Reſtoration, had had no reaſon to apprehend either the power or the influence of the Crown, began then to be conveyed to the Scots, concerning the vaſt importance of which the perfect freedom of the legiſlative guardians of their rights would be to their preſervation, and even concerning the political propriety of placing each individual among their legiſlators, as near as might be, on an exact level with the King. On that account, in the firſt year of the preſent century, perſonal liberty was ſecured to members of Parliament by an expreſs clauſe, inſerted in a famous (*y*) act, ſometimes termed the Great Charter of North Britain. But the protection eſtabliſhed by that ſtatute was limited to thoſe who were actually attending their duty during the ſeſſions of that aſſembly, as well as granted indiſcriminately to the Commons and to the Lords: And it was only in conſequence of the communication, which was ſtipulated to the nobility in the treaty concluded at the Union, of all the privileges enjoyed before it by the Peers of

(*y*) Parl. 1701. c. 6.

of England, that the Peers of Scotland became entitled to a perpetual exemption from perſonal execution. Hence, before that æra they were frequently neceſſitated, no leſs than other men, to retire into ſanctuaries for ſhelter; and protections were often obliged to be ſupplicated (*z*) by them from impriſonment for debt.

XXX. Before the 1ſt of May 1707 a Scotch Peerage, being a reſignable quality, became utterly extinct on the condemnation of the preſent poſſeſſor of it either for high treaſon or for any other crime which inferred loſs of honour, and could not afterwards revive in any of thoſe who might otherwiſe have ſucceeded to it. The devolution too of the right, on a perſon condemned before the ſucceſſion opened to him, cauſed an extinction of the dignity, no leſs than a forfeiture of every other thing, which devolved to him during the diſability produced by his guilt. Even the ſtatutes, paſſed after the Revolution in favour of the heirs of entail of perſons convicted of treaſon (*a*), preſerved not their honours; and noble

(*z*) Parl. 1663. c. 1. (not printed.)—Stair's Deciſions, 12th Feb. 1663, Earl of Southeſk v. Broomhall.—Fountainhall's Deciſions, 23d June 1681, Earl of Annandale.

(*a*) Parl. 1690. c. 33.—See Erſkine, B. 4. t. 4. § 20.—Parl.

titles, forfeited before the Union, cannot now be claimed with effect by any of the race intended to inherit them. But perſons, convicted or attainted of high treaſon in Scotland, were declared, by Parliament, in the reign of Queen Anne (*b*), to be thenceforth liable to the ſame pains, penalties, forfeitures, and corruption of blood, as perſons convicted or attainted of it in England; and important alterations were made on the Scotch law by that ordinance.

ſe of uffus.

In 1716 Kenneth Sutherland Lord Duffus was declared by an act of parliament to ſtand attainted of high treaſon in caſe he ſhould not render himſelf to a juſtice of peace on or before the laſt of June 1716 (*c*). After the death of Kenneth Sutherland, his eldeſt ſon Eric Sutherland in 1734 preſented a petition to his Majeſty, claiming the Peerage, and ſtating, that his father had determined to ſurrender himſelf to juſtice, but that on his way to execute his reſolution he had been arreſted at Hamburgh, and having been ſent a priſoner to England, he had been reſtrained by force from ſurrendering in

pril 5. 1734. terms of the ſtatute. Lord Delawarr, from the Lords

Parl. 1455. c. 44.—Parl. 1584. c. 18.—Parl. 1644. c. 33. —Parl. 1689. c. 33.—Parl. 1696. c. 24.—Acts of Sed. 12th June 1739—40.

(*b*) 7mo An. c. 20.

(*c*) 1mo Georg. I. c. 12.

Lords Committees for Privileges, to whom his petition was referred, reported to the Houſe of Peers, That the Committee had taken the petition into conſideration, had heard counſel as well on behalf of the Crown as of the petitioner, had alſo heard the judges, who attended the Committee, on ſome points of law propoſed to them; and were of opinion, That the petitioner has not a right to the honour, title, and dignity of Lord Duffus. The Houſe agreed to the report, and ordered it to be laid before the King (*d*). The argument there maintained by both parties ſeems to have reſolved into an inquiry concerning the truth and the conſequences of the facts alleged by Eric Sutherland, or into a queſtion whether Lord Duffus ſtood attainted at his death. At the time of pronouncing the judgement, the nature of Scotch Peerages was but imperfectly underſtood even by thoſe who poſſeſſed them: And it appears to have been admitted by Eric Sutherland, that the ſucceſſion of all the deſcendants of Lord Duffus was impeded by the taint given to his blood by the attainder which corrupted it; a propoſition, to which ſome lawyers are inclined to think that aſſent cannot be given entirely without heſitation, as it ſeems not eaſily

(*d*) Journals, 18th March and 5th April 1733-4.

reconcileable to other deciſions, pronounced in ſubſequent caſes.

It is agreeable to common ſenſe, they ſay, as well as to material juſtice, that a man cannot either forfeit or alienate a thing which is not his own, or more than belongs to himſelf. In conſequence, an heir of a Peerage, or an heir of entail, who is attainted and dies before the ſucceſſion devolves to him, does not forfeit the dignity or the lands. Eſtates ſtrictly entailed, not being the abſolute property of the preſent poſſeſſor of them, are not diſpoſable by him. Every heir, ſubſtituted by an entail, has a ſtrong and a ſeveral right, which conſtitutes in his perſon an independent and a diſtinct intereſt, that cannot be defeated by any of thoſe prior to him in the line of deſtination; and as he cannot be diſappointed even by the perſon who is in immediate poſſeſſion under the entail, neither can his ſeparate and proper eſtate be forfeited by any offence committed by another. The blood however of an attainted perſon is corrupted, or by the taint then acquired by it ceaſes to be inheritable, and his poſterity cannot take by deſcent from a remoter anceſtor any thing to which they muſt connect a title through him. Hence corruption of blood, which is a legal conſequence of an attainder, bars not ſucceſſion in all caſes. Each

perſon, who ſucceſſively inherits an entailed eſtate, does not repreſent his predeceſſor, and is not anſwerable for his deeds, but takes it in ſome ſort in the character of donee, by the will or grant of the donor, as if it had been directly conveyed to himſelf perſonally by the original owner who created the general limitations that operate in his favour. A traitor, therefore, in poſſeſſion of tenements ſecured againſt his acts by an entail to others after him, forfeits them or rather their fruits during his life; and as after his death the heirs ſubſtituted to him, in caſe he has not incurred an irritancy of his right, and is not in conſequence diveſted before his attainder, can complete their titles only either by ſerving themſelves heirs to him, the perſon laſt ſeiſed in fee, or by diſannulling the right that was in him, the forfeiture muſt continue in force during the exiſtence of ſuch iſſue, deſcended of his body, as would have been inheritable to the eſtate in caſe he had not been attainted of treaſon, becauſe the corruption of his blood, contaminating that of every perſon in whoſe veins it flows, forms an impediment to the ſucceſſion of all his deſcendants who muſt connect through him. Collaterals, to whom its influence does not extend, are not obſtructed by it (*e*).

But

(*e*) 16th Nov. 1750 and 18th Feb. 1752, John Gordon v.

But dignities, they obſerve, are in a ſituation very different from property. Honours are not enjoyed by any perſon, to whom they devolve, under the will or right or inheritance of his anceſtor, but are derived to every poſſeſſor of them ſolely from the favour and the gift of the King; as if each ſucceſſive individual, poſſible to come into being and to inherit them, had been diſtinctly foreſeen, particularly named, and originally called in the royal charter which granted them. In conſequence, a Peer requires not a ſervice, a conveyance, or the uſing of any form, to acquire a dignity that is caſt on him by deſcent, but on the death of his anceſtor is fully inveſted with it merely by his exiſtence, and may aſſume the title at pleaſure; and corruption of blood operates not on ſucceſſion to honours. Hence a Peerage (*f*), they infer, is not now forfeitable during a longer period than the life of the individual who was attainted, without diſtinction whether he was poſſeſſed of the dignity at the time of his attainder, or the ſucceſſion devolved to him afterwards; and they conclude, that on his death his children, no leſs than collaterals, are entitled to it, becauſe they all equally take it

v. his Majeſty's Advocate.—Judgements of the Houſe of Lords, 21ſt May 1751 and 1754, given on the appeals taken in theſe caſes. (*f*) P. 307. 308. 309. above.

it *per formam doni*, and are not obliged to connect their title through him, or indeed formally to eſtabliſh any in their perſons. Their reaſoning, too, they inſiſt, may be ſupported by authority.

In 1677 King Charles II. by letters patent granted the dignity of Lord Sinclair to Henry Sinclair and the heirs-male of his body; next, to John Sinclair, brother of Henry, and the heirs-male of his body; then, to Robert Sinclair, George Sinclair, and Matthew Sinclair, and the heirs-male of their bodies reſpectively in their order. In 1723 Henry Lord Sinclair died, leaving five ſons, John, James, William, Henry, and Matthew; but in 1716 his eldeſt ſon, John Sinclair, under the title of Maſter of Sinclair, had been attainted of high treaſon by parliament, and his ſucceſſion on the death of his father was impeded by that attainder. Hence the honours continued dormant during his life, but were not extinguiſhed by his forfeiture and ſurvivorſhip; an eſtabliſhed as well as important propoſition. In 1783, after the failure of all the heirs called before him, the Peerage, being claimed by Charles Sinclair, great-grandſon and heir-male of Matthew Sinclair, a perſon named in the patent, was adjudged by the Houſe of Lords to belong rightfully to him (*g*). Sinclair. 1716. 1723. 1783.

In

(*g*) Caſe of Charles Sinclair then exhibited to the Houſe of Peers.—See note (N).

Atholl. In 1703 John Murray Marquis of Atholl was created Duke of Atholl by a patent, under a limitation to the heirs-male of his body. His eldeſt ſon, William Murray Marquis of Tullibar-
1716. dine, in 1716 was attainted of high treaſon (*b*), and in 1747 died without iſſue. His ſecond ſon Lord James, under authority of acts of parlia-
1725. ment (*i*), ſucceeded on the death of his father to his honours as well as to his eſtate, but left a daughter only. In 1746, Lord George Murray, another ſon of John, next in ſucceſſion to the dignity, was alſo attainted (*k*); but he died in 1760 before his brother James. On the death of James Duke of Atholl in 1764, John Murray, eldeſt ſon of Lord George, claimed the Peerage,
Feb. 7. 1764. and was found by the Houſe of Peers to have a right to it (*l*). Lord George, having died before

(*b*) 1mo Georg. I. c. 2.

(*i*) 1mo Georg. I. c. 2. —— 6to Georg. II. c. 14. not printed. (*k*) 19no Georg. II. c. 26.

(*l*) Reſolved and adjudged by the Lords ſpiritual and temporal in parliament aſſembled, That the petitioner hath a right to the titles, honours, and dignities of Duke of Atholl, Marquis of Tullibardine, Earl of Strathtay and Strathardle, Viſcount of Balquidar, Glenalmond and Glenlyon, Lord Murray, Balvenie, and Gaſk, claimed by his ſaid petition. Journals, 2d—7th February 1764.—See Caſe of Lord Lumley cited in Dowtie's Caſe, 3 Coke, 11. 6.—— Mantlet's Caſe, Cro. Eliz. 28.—Hobert, 334.—Hale, 356. Caſe of Lord Viſcount Bolingbroke.—Journals, 30th April 1751, Drummond v. his Majeſty's Advocate.

fore Duke James, could not forfeit the honours even for a moment; and it was held not to bar the pretenſions of Mr Murray, that his propinquity was connected to his uncle and to his grandfather through his father, a perſon whoſe blood was corrupted in fees ſimple by an attainder.

* * * * * *

My Lord, ſome of the preceding obſervations relate to ſubjects, inſignificant and deſpicable indeed; Pedigrees, Arms, Supporters, Tinctures, Heraldry; on which it is almoſt beneath a man of any underſtanding to waſte the attention of a moment. But trivial facts may ſometimes furniſh apt proofs, and amuſing examples, to confirm or to illuſtrate general principles; and your Lordſhip, on that account, will excuſe me for having incidentally preſented matters of conceit, and articles of vanity, to your ſerious conſideration. My argument ought to be full. At a great expence of time, of labour, of pleaſure, and of ſpirits, I have now concluded it, out of materials

rials perhaps ſlender for the fabric reared from them. In all its parts my attention has been ſteadily directed to the real good of my country. The ardent affection I bear to Scotland impoſed on me an indiſpenſable obligation to expreſs my ſentiments with freedom. A man, ſincerely attached to its proſperity, will diſdain to flatter prejudices and habits which the eſſential intereſts of thoſe who cheriſh them, as well as a juſt regard to national union, require to be corrected and overcome; and, on a comparative view of its preſent ſtate, muſt alſo be pleaſed to diſcover many circumſtances of much ſatisfaction. The people are become more induſtrious, as well as very civilized; their houſes, their property, their perſons, are perhaps not leſs ſafer than thoſe even in the ſouthern parts of the iſland; labour and manufactures are promoted, and flouriſhing in ſeveral places; commerce is increaſing or encouraged; agriculture is reſpected and ſtudied; propoſals of improvement are examined with attention, or heard without ſcorn; the capital, by additions continually making to it, is growing extenſive and elegant; inventions and arts, the ornamental as well as the uſeful, are cultivated and patronized; and the Scots have acquired a celebrity in literature as well as in arms. Poſſibly, little advantage or information will be

derived to them from my Diſcourſe; yet one benefit, if no other, may perhaps be reaped from it. Thoſe who ſhall afterwards be called to judge concerning Peerages, I hope, will be aſſiſted by it to more accurate ideas, than have hitherto been entertained, of the objects about which their judgements are demanded; and, perhaps, they will alſo be furniſhed in ſome caſes with objections ſufficient to check attempts which may be made, after long intervals, to revive antiquated dignities. Obſolete claims are always ſuſpicious; and ſtrong preſumptions, almoſt of themſelves deciſive, muſt in every inſtance lie againſt them. It is very poſſible that honours may have been uſurped by families who had no right to them; but it is ſcarcely ſuppoſable that the anceſtors of any who pretend to dignities, if their claims had been valid, would have ſuffered their pretenſions to remain dormant for centuries, or even for generations. Their forbearance is of itſelf ſufficient to eſtabliſh, that they not only were known by others, but knew themſelves, not to have a good title to them, and that their claims, if entered, would have been rejected with contempt: And their heirs ought not to be permitted, at a diſtance of ages, to take advantage of the obſcurity in which objects are commonly involved by antiquity, for the purpoſe of arriving

ving, by means that approach to impoſition, at a poſſeſſion which it cannot eaſily be believed either they, or their predeceſſors, had juſt pretenſions to attain.

PROOFS

PROOFS

AND

ILLUSTRATIONS.

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AND

ILLUSTRATIONS.

NOTE (A) p. 116—125.

Proofs of the account, given in Sect. VI. Book I., of the Conſtitution of the Parliament of Scotland.

An Act uſually made by the King in Council before calling a Parliament in Scotland.

" THE King's Majeſty, with advice of his council, has ordained a parliament to be proclaimed to begin in the burgh of Edinburgh, the day of for ordering, treating, and concluding, of ſuch great matters as inſtantly occur concerning the King's grace, the weal of his realm, and the lieges thereof: Therefore,

fore, ordains the Director of the Chancery to direct precepts to all Prelates, Barons, Commiſſaries, and Baillis of boroughs, and all others our Sovereign Lord's freeholders within this realm, charging them to appear the ſaid day and place, for their advice to be had in ſuch things as, at that time, ſhall be propoſed to them." Eſſays on Britiſh Antiquities, eſſay, CONSTITUTION OF PARLIAMENT.—See alſo Mackenzie's Remarks on Lord Lovat's Anſwers to Fraſerdale's Condeſcendence.

Brief iſſued on that Act out of Chancery.

" Jacobus, Dei gratia, Rex Scotorum, Vice-comiti et Ballivis ſuis de Argyle, ſalutem. Quia ordinavimus parliamentum noſtrum tenendum apud Edinburgh, et inchoandum die Sabbati, octavo die menſis Julii proxime futuri, cum continuatione dierum; vobis praecipimus et mandamus, quatenus ſummoneatis, ſeu publice ſummoneri faciatis, omnes et ſingulos Epiſcopos, Abbates, Priores, Comites, et Barones, et caeteros libere-tenentes totius balliae veſtrae, et de quolibet burgo tres vel quatuor de ſufficientioribus burgenſibus ſufficientem commiſſionem habentibus, quod compareant coram nobis, dictis die et loco, in dicto noſtro parliamento, una cum aliis regni noſtri praelatis, proceribus, et burgorum commiſſariis, qui tunc ibidem propter hoc intererunt congregati; ad tractandum, concordandum, ſubeundum, et determinandum ea quae in dicto noſtro parliamento, pro utilitate regni noſtri et reipublicae, tractanda fuerint, concordanda, ſubeunda, et determinanda: Et vos Vicecomites ſitis ibidem dicto die, habentes vobiſcum ſummonitionis veſtrae

veſtrae teſtimonium, et hoc breve: Et hoc, ſub poena quae competit in hac parte, nullatenus omittatis. Datum ſub teſtimonio noſtri magni ſigilli, apud Halyrude-houſe 15to die menſis Maii, anno regni noſtri viceſimo 1587.—Vicecomiti et Ballivis ſuis de Argyle. Pro parliamento." Stair, B. 4. t. 3. § 16.—See alſo Eſſays on Britiſh Antiquities.

Title prefixed to the Acts of Robert III.

" Parliamentum Domini noſtri Roberti tertii, Scotorum Regis illuſtriſſimi, tentum apud Sconam, die lunae 21mo Februarii, anno gratiae 1400mo, regni ſui 11mo, cum continuatione dierum ſubſequentium; ſummonitis et ibidem vocatis, more ſolito, Epiſcopis, Prioribus, Ducibus, Comitibus, Baronibus, Libere-tenentibus, et Burgenſibus, qui de Domino noſtro tenent in capite."

Title prefixed to the Eighth Parliament of James I.

" In parliamento octavo vel concilio generali illuſtriſſimi Principis Jacobi, Dei gratia Regis Scotiae, tento apud Perth, et inchoato, ratificato, et approbato, tanquam ſufficienter et debite praemonito, per tres regni ſtatus, 12mo die menſis Julii, anno Domini 1428vo, cum continuatione dierum et temporum; ſummonitis et vocatis, debito modo et more ſolito, Epiſcopis, Abbatibus, Prioribus, Comitibus, Baronibus, et omnibus Libere-tenentibus, qui tenent in capite de dicto Domino noſtro rege, et de quolibet burgo regni certis burgenſibus; comparentibus omnibus illis qui debuerunt, voluerunt, et potuerunt intereſſe; quibuſdam vero abſentibus, quorum quidam fuerunt

legitime excuſati; aliis per contumaciam ſe abſentantibus, quorum nomina patent in rotulis ſectarum, quorum quilibet adjudicatus fuit in amerciamento decem librarum ob ejus contumaciam."—See alſo the titles prefixed to the firſt ſtatutes of Robert I.; to the ſixth, ſeventh, and eighth parliaments of James I. and the fifth, ninth, and eleventh (*a*) parliaments of James II.

An act, intitled, That all Prelates, Barons, and Freeholders, ſhall compear perſonally in the Parliament.

"*Item*, It is ordained and ſtatute, that all Prelates, Earls, Barons, and Freeholders of the King, within the realm, ſince they are holden to give preſence in the King's parliament and general council, from henceforth be holden to compear in proper perſon, and not by a procurator; but, if the procurator allege there, and prove a lawful cauſe of their abſence." Parl. 1425. c. 58. of the old edition commonly diſtinguiſhed under the name of the Black Acts.

An act of a Parliament of Robert I.

"Hoc eſt tranſcriptum indenturae concordatae et affirmatae inter Dominum Robertum, Dei gratia Regem Scotorum illuſtrem, et Comites, Barones, Liberetenentes, communitates burgorum, ac univerſam communitatem totius regni, magno ſigillo regni, et ſigillis magnatum et communitatum praedictorum alternatim ſigillatum in haec verba. Praeſens indentura teſtatur, quod 15mo menſis Julii, anno ab incarnatione Domini 1326to, tenente plenum parliamentum ſuum apud Cambuſkenneth ſereniſſimo Principe Domino Roberto,

De

(*a*) P. 36.

Dei gratia Rege Scotorum illuſtri; convenientibus ibidem Comitibus, Baronibus, Burgenſibus, et caeteris omnibus Libere-tenentibus regni ſui; propoſitum erat, &c.—Qui omnes et ſinguli Comites, Barones, Burgenſes, et Libere-tenentes, tam infra libertates quam extra, de Domino rege, vel quibuſcunque aliis Dominis infra regnum mediate vel immediate tenentes, cujuſcumque fuerint conditionis, conſiderantes, &c." Appendix to Hiſtorical Law Tracts, vol. ii.

" The hail three eſtates of the realm ſitting in plene parliament; that is to ſay, the Clergy, Barons, and Commiſſioners of boroughs, by one aſſent, none diſcrepant, well adviſed and delivered, have revoked all alienations," &c. Parl. 1437. c. 2.—See Parl. 1493. c. 72.—Parl. 1584. c. 3.—Parl. 1587. c. 40. 41.—St. Dav. II. c. 41. 46.—St. Rob. II. c. 3. § 1. c. 17.

" Originally with us none had a ſeat in parliament but thoſe poſſeſſed of a freehold of the King. Thus, the Biſhops, Abbots, and Priors, and likewiſe the Peers, ſat there in reſpect of their baronies, all nobility and peerage being of old territorial: And the other freeholders were all entitled to ſit in parliament, and bound to attend, till the ſmall barons and freeholders, as a privilege, were exempted from neceſſity of attendance, and the freeholders of each ſhire allowed to chooſe commiſſioners to repreſent them. I muſt here remark, that the great (*b*) barons and freeholders, that were diſpenſed with as to their attendance, were at firſt declared to be ſuch as held lands of the King under L. 20; but thereafter, ſuch as were under

(*b*) Error for ſmall.

100 marcs.—After the ſmall barons and freeholders were indulged to appear by their repreſentatives in parliament, ſome of them ſtill gave attendance as they might." Macdouall, B. 4. t. 1. f. 1. § 8. 9. 10.

" All Barons were equally entitled, as Lords of parliament, to ſit and vote in it; the three eſtates conſiſting of the Clergy, Barons, and Commiſſioners of boroughs." Macdouall, B. 2. t. 3. f. 8. § 83.

" Before the union of the crowns we had our own parliament, conſiſting of the King and three eſtates, viz. the Biſhops (in times of Epiſcopacy), with whom the Abbots and Priors were conjoined before the reformation, as the firſt eſtate; Peers and Commiſſioners from ſhires and ſtewartries as the ſecond; and the Commiſſioners from boroughs as the third eſtate. —The conſtitution of our parliament varied from that of England in this, that all the eſtates with us aſſembled in the Parliament Houſe, in a joint meeting, by the majority of which, in ordinary caſes, all matters either in a legiſlative or judicial procedure were decided; but ſtill the diſtinction of the three eſtates was kept up, as is after mentioned.—The particular conſtitution of our parliament, and the variations it received, were as follows. It conſiſted of three ſeparate eſtates, as juſt ſaid. Each eſtate had its own proper authority: So that, if the majority of any one of the three eſtates diſſented, no bill could paſs into an act of parliament by receiving the royal aſſent. Wherefore, though they ſat all together in one houſe, yet they were in effect three ſeparate aſſemblies. Indeed they commonly voted promiſcuouſly: But if any of the eſtates had expreſsly taken diſſent againſt the vote, it could

could not pafs into a law. This we are aſſured was the caſe by a learned lawyer, who could not be miſtaken: And it was declared high treaſon to impugn any one of the three eſtates of parliament, which neceſſarily ſuppoſed that each had a diſtinct authority. Upon the Revolution, indeed, the model of our parliament was altered: For the ſpiritual eſtate being removed by the abolition of Epiſcopacy, the commiſſioners from ſhires and ſtewartries, called the Barons or Freeholders, were inſtalled in their room, though formerly joined to the eſtate of Lords Temporal. Thus the parliament conſiſted ſtill of three eſtates, viz. the Lords, Barons, and Burgeſſes; and each of them had an equal number of members, choſen by themſelves, for all committees of parliament: So that the conſtitution and power of the parliament was ſtill the ſame, and the diſſent of any one of the three eſtates would have barred any matter propoſed from paſſing into an act." Macdouall, B. 4. t. 1. f. 1.

" The Parliament of old was only the King's Baron Court, in which all freeholders were obliged to give ſuit and preſence in the ſame manner that men appear yet at other head-courts.—The Parliament is called by proclamation now on forty days, though it may be adjourned by proclamation on twenty days preceding the prefixed day at which it ſhould have met: But of old it was called by brieves out of the Chancellary. It conſiſts of three eſtates; viz. the Archbiſhops and Biſhops; and, before the Reformation, all Abbots and mitred Priors ſat as churchmen. *Secundo*, the Barons, in which eſtate are comprehended all Dukes, Marquiſſes, Earls, Viſcounts, Lords, and the Commiſſioners

ers for the ſhires; for of old all Barons, who held of the King, did come: But the eſtates of leſſer Barons not being able to defray this charge, they were allowed to ſend commiſſioners for every ſhire; and generally every ſhire ſends two, who have their charges borne by the ſhire. *Tertio*, the commiſſioners for burghs royal, each whereof is allowed one, and the town of Edinburgh two." Sir George Mackenzie's Inſtitutions, B. 1. t. 3. Sir George wrote a little before the Revolution.—See ſtat. Will. c. 7. §1. c. 9. §1. c. 32.—St. Alex. II. c. 2.—Title prefixed to ſt. Rob. I. and c. 32.—Parl. 1427. c. 112.—Parl. 1449. c. 26.—Parl. 1457. c. 68. 85.—Parl. 1471. c. 61.—Parl. 1477. c. 88.—Parl. 1489. c. 28. 33.—Parl. 1503. c. 113.—Parl. 1587. c. 114.—Parl. 1621. c. 23.—Parl. 1633. c. 1.—Parl. 1690. c. 3.—Stair, B. 2. t. 3. §2.—Erſkine, B. 1. t. 3. §2. 3.—Eſſay, CONSTITUTION OF PARLIAMENT; and Eſſay, HONOUR, DIGNITY.—Craig, L. 1. d. 7. §11: d. 12. §18. cited p. 405 above.—Keith's Hiſtory, p. 75.

NOTE (B) p. 137.

Time about which Earls were firſt created in Scotland.

IT is commonly ſuppoſed, but ſeems not to be certain, that Earls were firſt imported into Scotland by Malcom Canmore. Buchanan, whoſe vaſt abilities entitle even ſceptical doubts, entertained by his penetrating mind, to more conſideration than poſitive aſſertions made after laborious reſearches by any ſhallow anti-

antiquary, talks with great diffidence on the matter (*c*). His maſter, Major, a faithful writer, does not take any notice of the fact (*d*). Boece, whoſe elegant ſtyle and correct compoſition, not to add beautiful genius and fine fancy (*e*), are concluſive proofs that his underſtanding could not be inaccurate, after obſerving that Macduff was created Earl of Fife by Malcom, and that the titles of Menteith, Athole, Lennox, Murray, Caithneſs, Roſs, and Angus, were beſtowed on others of his partizans, ſays only that theſe are the firſt Earls remembered in our annals (*f*). Fordun, our oldeſt hiſtorian, who, as well as Boece, Major, and Buchanan, enumerates the ſplendid privileges which were conferrred on the family of Fife, of placing the King of Scotland in his chair of ſtate, and of putting the crown on his head, at the ceremony of his coronation; of commanding the van-guard of the royal army in war; and of making atonement, by a ſmall fine, for unpremeditated ſlaughter; not only is entirely ſilent on the introduction of that title, but does not even take notice of the elevation of Macduff (*g*). Both Earldoms and Baronies are probably more acient than Malcom, and are frequently mentioned before his acceſſion (*h*).

In ſome of the oldeſt writings extant, moſt of the orders which are yet known, are articulately diſtinguiſhed in regular gradation; among others, Earls, Barons, and

(*c*) VII. 14. (*d*) III. 5.

(*e*) See his hiſtory of Duncan I. in B. xii.

(*f*) Hi primi fuere Comites, quorum noſtri meminerunt annales. L. 12. p. 264.

(*g*) L. 5. c. 9. &c.

(*h*) Niſbet's Heraldry, v. ii. p. 4. ch. 8.

and ſheriffs (*i*), which, inſtead of novelties that had been lately introduced, ſeem then to have become familiar in the conſtitution (*k*). Anderſon has publiſhed ſeveral charters, granted by David I. a ſon of Malcom Canmore, which are addreſſed to the Biſhops, Abbots, Earls, Barons, Sheriffs, and all the good men of his whole land (*l*); a diſtinctneſs, and a frequency, which they could hardly have attained during the ſhort period that intervened between the reſtoration of Malcom and the death of his ſon David, or of William the Lion.

In an authentic deed cited by Sir James Dalrymple (*m*), Ethelred, a ſon of Malcom Canmore, is termed Earl of Fife, and muſt have poſſeſſed that honour before Macduff, the perſon who is affirmed to have been raiſed to it immediately after the acceſſion of that prince.

An original charter (*n*) is ſtill in being, which eſtabliſhes, that in 1171 Morgund, ſon of Gillocherus Earl of Marre, was aſcertained by an inqueſt to have a right to the Earldom of Marre; and that his father, if not his remoter predeceſſors, had been Earls of Marre. On tolerable evidence, their nobility can be traced at leaſt to the days of Malcom Canmore. An Earl of Marre, I am told, is a witneſs to a donation which this

(*i*) Comites, Barones, et Vice-comites.

(*k*) Crawfurd's Officers of State, p. 429. 430. 431.

(*l*) Epiſcopis, Abbatibus, Comitibus, Baronibus, Vice-comitibus, et omnibus probis hominibus totius terrae ſuae. *Diplomata*, N° 13. 15. 17. 18. 19. 20. 23.

(*m*) B. 9. p. 225.—Crawfurd, p. 430.

(*n*) See a copy of it in Selden, Titles of Honour, p. 848.

this prince made in 1065 to the Culdees of Loughleevin.

Comites, and even Vice-Comites, as well as Barons, are mentioned in the ſtatutes of Malcom II.

Fordun affirms, that, in 994, Kenneth III. was killen by Fenele, daughter of Cruchne Earl of Angus (o).

NOTE (C) p. 131—139.

Proofs that the word Comes *or* Earl *meant the owner of a Comitatus or Earldom.*

"QUI a Principe de Ducatu aliquo inveſtitus eſt, Dux ſolito more vocatur. Qui vero de Marchia, Marchio dicitur: Dicitur autem Marchia, quia Marcha, ut et plurimum juxta mare ſit poſita. Qui vero de aliquo comitatu inveſtitus eſt, Comes appellatur." L. 2. Feud. c. 10.

"Item, ordinaverunt, quod nullus Baro, vel Comes, vel aliquis alius, receptabit malefactorem aliquem infra dominationem ſuam ſub poena ammiſſionis curiae in perpetuum." Stat. Malc. II. ch. 10.——See alſo ch. 14. § 3. 4. 5.

"Placitum civile, quod non eſt criminale quoad vitam et membra, aliud pertinet ad praepoſitos burgorum et civitatum; aliud ad curiam Baronum, Comitum, Epiſcoporum, Abbatum, et aliorum libere-tenentium, qui curias ſuas proprias habent ſecundum formam ſuarum chartarum." Reg. Maj. l. 1. c. 4.—c. 3. § 1. 7.

"Robertus, Dei gratia Rex Scotorum, omnibus, probis

(o) L. 4. c. 35.

probis hominibus totius terrae ſuae, clericis et laicis, ſalutem. Sciatis, quod conceſſimus David Seneſcalli, militi, filio noſtro cariſſimo, Comitatum de Strathern, cum pertinentiis, tenendum et habendum ſibi et heredibus ſuis, in omnibus et per omnia juxta formam et tenorem cartae ſibi exinde confectae, et adeo libere, quiete, plenarie, integre, et honorifice, in omnibus et per omnia, ſicut quondam Maliſius Comes de Strathern, vel aliquis alius Comes ejuſdem, ipſum Comitatum cum pertinentiis aliquo tempore liberius, quietius, plenius, integrius, et honorificentius juſte tenuit ſeu poſſedit." Charter of Robert II. printed in Append. ix. to the Brief of Sir Robert Gordon.

A ſtatute of David II. forbids pounds (nami) to be taken in any land without leave of the owner of the ground; and orders, if they be taken in the eſtate of an Earl or of a Baron, that the Earl or the Baron have ſix cows. "Si vero in terra Comitis vel Baronis, Comes vel Baro habeat ſex vaccas." c. 7.

The Earldom of Wigton, or lands erected into it, were granted by David II. to Malcolm Fleming, and his heirs, under an obligation impoſed on the Earls of rendering to the King the ſervice of five knights or ſoldiers in his army: "Faciendo nobis et heredibus noſtris praedictus Malcolmus et heredes ſui praedicti, Comites de Wigton, ſervitium quinque militum in exercitu noſtro." *Crawfurd's Peerage*, *title* WIGTON.

The words of Boece, ſpeaking of Robert II. are, Eodem anno filios agris donavit: Joannem comitem Carrictae effecit ac Scotiae Seneſcallum; Robertum comitem Fife et Menteith; Alexandrum dominum Badyenothae; Davidem ex Euſemia primogenitum comitem

tem Ernaevallis, vernaculo Scotorum ſermone Strathern; Walterum comitem Atholiae. L. 16. p. 340.—St. Rob. II. c. 17.

In a charter of the Earldom of Levenax, granted by James VI. to his grand-uncle Robert Stewart, Robert Stewart and his heirs are conſtituted Earls of that Earldom: "Conſtituimus et ordinamus dictum dominum Robertum et heredes ſuos ſubſequent. in Comites dicti Comitatus de Levinax:" A phraſe abundantly remarkable to be ſtill uſed in the year 1578. *Brief*, p. 138. —See alſo charter of the Earldom of Marre, publiſhed in Selden, p. 848.—Charter of the Earldom of Murray, publiſhed in Eſſays concerning Britiſh Antiquities.—Charters of Levenax dated in 1384 and 1385, in the chartulary of Lennox, N° 13. 15.—Ad. Caſe, ch. 5. p. 40. 41.

"The King calling to remembrance how that the Earldom of Murray was reft from James Creighton, who married the eldeſt daughter of the Earl of Murray, as ſaid is, by the ſubtile craft of William Earl of Douglas, and given to Archibald his brother, he reſtored the ſame to him again: But when James Creighton perceived that he could not joyſe the lands without the hatred of many gentlemen, he again put it in the King's hand; and his ſon thereafter, called George Creighton, in recompenſation thereof was made Earl of Caithneſs." Pitſcottie, p. 93.—Compare Ad. Caſe, ch. 4.

NOTE

NOTE (D) p. 148—155.

Proofs that dignities conferred on lands, on alienation, paſſed along with the fiefs from the former proprietors to the new acquirers.

"NOBILE autem feudum eſt, quod poſſeſſorem ſive vaſſallum nobilitat et inter nobiles ſiſtit.—Sane cum princeps ſit fons et origo omnis nobilitatis, ſic et inter alios diſtributor eſt, et quoties terras cum dignitate confert, licet nobilitatem non exprimat, nobilem tamen facit." Craig, L. 1. d. 12. § 23.—"Amittitur autem in jure nobilitas amiſſo feudo."—Craig, L. 1. d. 12. § 25.—"Ego tamen hic aliquam diſtinctionem eſſe adhibendam puto, ut nempe ea tantum feuda a principe conceſſa nobilitent, quae cum dignitate et juriſdictione conceduntur; qualia ſunt Ducatus, Marchionatus, Comitatus, Baroniae. His enim dignitas et juriſdictio inhaeret; itaque cum ipſo feudo nobilitas conceſſa videtur."—Craig, L. 1. d. 10. § 16.

"Noble fees are thoſe which conferred nobility to perſons veſted in them." Macdouall, ii. 3. § 83.—— "In ancient times, when nobility was founded in feudal dignities, it followed the property of the eſtate to which it was annexed; and, conſequently, whenever one was diveſted of the eſtate, his title of honour behoved to ceaſe." Ibid. § 84.—"'Tis plain that the ancient feudal Peerage, as all other territorial dignity, could not be enjoyed by any other than thoſe having a right to the lands and baronies to which the ſame was annexed. But this is long ſince antiquated, and Peerage is become a perſonal dignity," I. 2. § 30.

"In

"In theſe Gothic conſtitutions, honour and dignity were originally annexed to lands and offices, and in no caſe to perſons or families, independent of lands or offices."—"The caſe would be different, when the Earldom or Barony was diſponed whole and entire; for there the honour, for many ages, was certainly tranſmitted with the eſtate."—"It is clear, from what is above ſaid, that both of them were once territorial dignities, and that, when the eſtate was aliened, the dignity went along with it."—"The honour of a Baron by tenure was annexed to the land, and went with it to the purchaſer of the Barony along with the juriſdiction and its other acceſſories." Lord Kames's Eſſay, HONOUR, DIGNITY.

NOTE (E), p. 148.—156.

Other inſtances, which prove that nobility and titles were implied in lands raiſed to them, and accompanied the noble fiefs.

March. ON the 25th of July, in the 39th of David II. George Dunbar, on the reſignation of his father Patrick Earl of March, obtained from that King a charter of the eſtate or earldom of March; and in ſix months, to wit on the 8th of February after, in another charter, you find him ſtyled George Earl of March.—Record of Charters, B. 1. N° 196. 244.—Ad. Caſe, ch. 4. p. 43.

Caithneſs. The famous Walter Stewart, (a ſon of Robert II. by his ſecond wife Eupham Roſs), having got a grant of the earldom of Caithneſs, bore the title correſpond-

ing to it; but reſigned the eſtate to his ſon Allan, who obtained from James I. a charter of it to himſelf and the heirs-male of his body; in their default, to return to Walter and his heirs-general. In conſequence Walter ceaſed to be termed Earl of Caithneſs, and the title was carried by Allan even during his father's life. In 1431 Allan Earl of Caithneſs was killed in a battle fought by him and the Earl of Marre at Innerlochy in Lochaber, with Donald Balloch and other partizans of Alexander Lord of the Iſles; and on his death, without iſſue, the earldom reverted to Walter, by whom the title was re-aſſumed. Fordun, l. 16. c. 17.—Boet. l. 17. p. 360.—Major, l. 6. c. 13. Buchanan, l. 10. c. 33.—Hawthornden, p. 27.—Record of Charters, B. 3. N° 74.——Ad. Caſe, ch. 4. p. 44.

Menteith. In 1427, James I. having deprived Maliſe Graham of the Earldom of Strathern, erected the lands of Craynis, &c. into the Earldom of Menteith, and by a charter, in which the eſtate alone is conveyed, granted them, incorporated into that denomination, to Maliſe Graham, and the heirs-male of his body; on their default, to return to the Crown. In conſequence, Maliſe Graham ceaſed to bear the title of Earl of Strathern, and aſſumed that of Menteith. In an inſtrument, in which he is mentioned among thoſe who, at the redemption of James I. were hoſtages for payment of the ranſom, he is termed Earl of Strathern; but in that, dated in 1427, which relates to his own releaſe from captivity, he is called Earl of Menteith; and this title was carried by his ſucceſſors till his family became extinct. Charter, 6th September, 1427.—

Rymer,

Rymer, XI. 339.—Sup. Cafe, p. 20.—Ad. Cafe, ch. 5. p. 57.—Buchanan, l. 10. c. 48.

Walter Stewart, Lord Lorn, conveyed the Lordſhip of Lorn to Colin Cambell Earl of Argyle, one of the Chancellors of Scotland. In 1470, on Lorn's reſignation, the Earl of Argyle obtained from the Crown a charter of the lands, and, in conſequence, among other titles, took that of Lorn. In a charter dated in 1466, Walter is ſtyled Lord Lorn. In the grant of 1470, the Earl of Argyle is deſcribed Colin Earl of Argyle, Lord Cambell; but Lord Lorn is one of the titles borne by him in 1472, and is ſtill carried by the family of Argyle. Crawfurd's Officers of State, p. 44. &c.—Parl. 1489. c. 39.—Mem. for Lord Lovat, p. 6. 7.—Sup. Cafe, p. 17.—Ad. Cafe, ch. 6. p. 86.—Parl. 1563. c. 1.—Parl. 1567. c. 1.—Parl. 1579. c. 2.—Parl. 1581. c. 17. Lorn.

In 1467, Thomas Boyd, eldeſt ſon of Robert Lord Boyd, married Lady Mary Stewart, a ſiſter of Ja. III. and having obtained from that King a charter of the Earldom of Arran, became Earl of Arran. But the ſovereign aſcendant, which, erected on the unſtable foundation of the frivolous accompliſhments of his brother Sir Alexander, Lord Boyd had acquired over a weak Prince, ſoon exciting univerſal envy, was not of long duration. Lord Boyd, obliged for ſafety to fly into England, died at Alnwick in Northumberland: The Earl of Arran, who had been ſent ambaſſador to Denmark, after, on his return to the Frith of Forth, having made a narrow eſcape, was condemned by parliament, and the Earldom of Arran was ſeized by the Crown. During all the viciſſitudes of Arran.

his adverſe fortune, his Counteſs maintained an inviolable attachment to his perſon; but after his death, was at laſt perſuaded, in 1474, to marry James Lord Hamilton, to whom Hawthornden ſays the Earldom of Arran was given in dowry with her. Hence the family of Hamilton acquired a right to the dignity of Earl of Arran; a title by which they were long diſtinguiſhed, and which is ſtill retained by them. Buchanan, l. 12. c. 26. &c.——Hawthornden, p. 111. 115. 119. 120. 218. 219.—Pitſcottie, p. 101.—Crawfurd's Officer's of State, p. 313.—Abercrombie, V. ii. p. 396. 407. &c.—Parl. 1475. c. 79.

NOTE (F), p. 158—223.

Before 1587 *territorial Honours were deſcendible with the noble fiefs to heirs-female as well as to heirs-male.*

Buchan. On the death of Fergus Earl of Buchan, the title as well as the eſtate went to his daughter Marjory, who married William Cumin; and both were tranſmitted from her to their ſon Alexander Cumin, who was Earl about the middle of the thirteenth century. Chart. of St Andrew's, p. 378. 379. 380. 381.—Chart. of Aberbroth. v. 1. p. 6. 10. 22. 63. 81. 190.—Chron. of Melroſe, ad. ann. 1233.—Ad. Caſe, ch. 5. p. 4.—Rymer, II. 200. 205. 266. 471. 772.

Angus. On the death of Malcom Earl of Angus, both the Earldom and the honours devolved to his only child Matilda, who married Gilbert de Umfraville, an Engliſhman by deſcent; and were tranſmitted from her to their ſon Gilbert de Umfraville, by whom, during

ring the reign of Robert I. the eſtate, and in conſequence the dignity, were forfeited for his attachment to the party of Baliol. But, as that forfeiture could not operate out of Scotland, the title of Earl of Angus was ſtill retained in England by the family of Umfraville. Chart. of Aberbroth. v. i. p. 28. 52. 53. 75.—Chron. of Melroſe, ad an. 1243.—Coke, 4 Inſt. p. 47.—Rymer, II. 1082. III. 52. 94. 160. 192. 201. 271. 411. 553. 698. 953. IV. 103. 694.——Dugdale, v. i. p. 505. v. ii. p. 505.—Ridpath, p. 380.—Mackenzie's Cond. p. 1. and Lovat's Anſwers to it, p. 2.——Ad. Caſe, ch. 5. p. 10.

Athole. In 1242, on the death of Patrick Earl of Athole, the Earldom, in default of heirs of his body, went to his mother's ſiſter Fernelith, wife of David de Haſtings, and from them paſſed to their only child Adda, who married John de Strathbolgie. Both the eſtate and the title were enjoyed by their deſcendants, till David their great-grandſon was attainted by Parliament in 1323. Ad. Caſe, ch. 5. p. 8. — Fordun, l. 9. c. 59. l. 13. c. 22. 25. 36.— Chron. of Melroſe, apud Gale, p. 206. —Chart. of Dunfermline, v. 2. p. 24. — Mackenzie's Cond. p. 1. and Lovat's Anſwers to it, p. 4.—Rymer, II. 266. 280. 776. III. 404. 587. IV. 616. 136. 437.—See p. 169. 170. above.

Lennox. 1372. On the death of Donald Earl of Lennox in 1372, without male iſſue, the Earldom went to his only daughter Margaret Counteſs of Lennox, from whom both the title and the eſtate were conveyed to her ſon Duncan Earl of Lennox. The heir-male of the family (for an heir-male is affirmed then to have exiſted, and to exiſt ſtill) did not pretend to the honours. Ad.

Caſe, ch. 5. p. 39.—Mackenzie's Cat. p. 6. and Cond. p. 9.—Chart. of Lennox, N° 13. 15.

Murray. 1346.

Sir Thomas Randolf, the famous regent (*p*), was ſucceeded in the Earldom of Murray, firſt by his eldeſt ſon Thomas, then by a younger ſon John Randolf, Earl of Murray, one of thoſe who were ſlain in 1346 at the battle of Durham. In the original grant made by Robert Bruce, the Earldom, in default of heirs-male of the body of Sir Thomas Randolf, had been limited to return to the Crown: But that deviſe was alterable; and on the death of John Randolf without iſſue, the honours, as well as the eſtate, perhaps in conſequence of a ſettlement confirmed by the King, went to his ſiſter Agnes, the famous Counteſs of Patrick Dunbar Earl of March, who, with heroic bravery, defended the caſtle of Dunbar againſt the forces of Edward III. It is probable that the Counteſs and her huſband, wiſhing to preſerve diſtinct repreſentations of their families, made a partition of their eſtates; the Earldom of March was given to their eldeſt ſon George; but Agnes ſettled the Earldom of Murray on her ſecond ſon John Dunbar, who married Marjory Stewart, a daughter of Robert II. That Prince, in conſequence of the return ſtipulated to Majeſty, poſſeſſed a controlling power over the fief, and granted him a charter of a conſiderable part of it, re-erected under the ſame denomination. Charter of Murray.—Fordun, l. 13. c. 21. 23. 25. 33. 40. 48. 49. l. 14. c. 3. 36. 37. 38. 42. 47. 53.—Boet. l. 15. p. 335. l. 16. p. 340.—Major, l. 5. c. 15. 24. l. 6. c. 3.—Buchanan, l. 9. c. 25. 56. 59.—Mackenzie's Cat. p. 9. and Cond. p. 12.—Lovat's

(*p*) P. 139. above.

—Lovat's Anſwers, p. 20.—Dalrymple's Collections, p. 345·346.—Pitſcottie, p. 47.48.—Rymer, VII. 338. 434. 565. 737.—See p. 142. above.

NOTE (G), p. 176—181.

Titles were allowed by courteſy to huſbands in conſequence of marriage.

Buchan. Before 1233.

ABOUT the beginning of the thirteenth century, Marjory, Counteſs of Buchan, married William Cummin: Her huſband got the title of Earl of Buchan. Chart. of St Andrews, p. 378.—Chron. of Melroſe, ad an. 1233.—Ad. Caſe, ch. 5. p. 5.

Angus. 1240.

John Cumin, who married Matildis Counteſs of Angus, was termed Earl of Angus. Chron. of Melroſe, ad an. 1242.—Ad. Caſe, ch. 5. p. 11. ch. 7. p. 170.

Athole. 1231.

Thomas of Galloway eſpouſed Iſobel Counteſs of Athole, and was ſtyled Earl of Athole. Fordun, l. 9. c. 48.—Dalrymple's Collections, p. 379.—Collection of charters in the Advocates Library, N° 60.—Ch. Dunfermline, fol. 82.—Mackenzie's Cat. p. 1. and Cond. p. 4.—Ad. Caſe, ch. 5. p. 8. ch. 7. p. 171.

1242.

David de Haſtings, who married her ſiſter Fernelith Counteſs of Athole, bore the title of Earl of Athole. Chron. of Melroſe, ad an. 1242, in Gale, p. 206.—Ad. Caſe, ch. 5. p. 9. ch. 7. p. 171.

1269.

Their daughter Adda, Counteſs of Athole, married John de Strathbolgie. In conſequence her huſband became Earl of Athole. Sir J. Balfour's MS. Col-

lections.—Rymer, II. 266. 280.—Ad. Cafe, ch. 5. p. 9.

Carrick. 1270. Robert Bruce, who married Margaret Counteſs of Carrick, was Earl of Carrick in right of his wife. Fordun, l. 10. c. 1. 29. l. 11. c. 13.—Winton's Chronicle, c. 139 —Chalmer's Origine des Ecoſſois, p. 153. —Rymer, II. 84. 86. 126. 248. 266. 471. 611. 612. 614. 643. 799.—Ad. Cafe, ch. 5. p. 18. ch. 7. p. 172.

Murray. 1346. On the death of John Randolf Earl of Murray, the Earldom of Murray devolved to his ſiſter, Black Agnes, the gallant Counteſs of March. On that event her huſband, Patrick Dunbar Earl of March, added the ſtyle of Murray to his own title of Earl of March. Fordun, l. 14. c. 27.—Mackenzie's Cat. p. 9. and Cond. p. 12.—Lovat's Anſwers, p. 20.—Pitſcottie, p. 47.—Dalrymple's Collections, p. 345.

Fife. About 1350. Both Sir William Ramſay and Sir Thomas Biſſet, who married Iſabel Counteſs of Fife, bore the title of Earl of Fife. Charter of David II. 20th of Auguſt 1359. —Sibbald's Hiſtory of Fife, p. 97.—Fordun, l. 6. c. 53.

Lennox. Before 1384. Walter de Faſlane married Margaret Counteſs of Lennox, and, in a charter granted in 1384 by Robert II. is admitted by the Sovereign to be Earl of Lennox. Chart. of Lennox, N° 13. 15.—Ad. Cafe, ch. 5. p. 39. 40. ch. 7. p. 175.

Marre. 1379. Margaret Marre, Counteſs of Marre, married William Douglas Earl of Douglas. Her huſband was thence ſtyled Earl of Marre as well as Earl of Douglas. Record of Charters, Roll 5. N° 91. &c.—Ad. Cafe, ch. 5. p. 36. ch. 7. p. 175.—Rymer, VII. 175.—Fordun, l. 11. c. 22.

Strathern. 1414. Euphame Counteſs Palatine of Strathern, a granddaughter

daughter of Robert II. married Sir Patrick Graham, who, on his marriage, was dignified with the pompous title of Earl Palatine of Strathern. Charters, 28th March 1414; 8th October 1414; 10th Auguſt 1418. —Dalrymple's Collections, p. 377.—Fordun, l. 15. c. 23.—Rymer, VIII. 544. 735.—Mackenzie's Cat. p. 12. Cond. p. 14. and Inform. p. 12. 18.—Lovat's Anſwers, p. 25.—Ad. Caſe, ch. 5. p. 56. ch. 7. p. 175.

NOTE (H) p. 184—188.

Before 1587, *territorial Honours became extinct on the partition of the noble fiefs among coheireſſes.*

Halyburton.

PATRICK Lord Halyburton, who died in 15 , left three daughters, Janet, married to William Lord Ruthven, Marion to George Lord Home, and Margaret to George Ker of Faudenſide; among whom his eſtates were equally divided by thirds: And either the dignity became extinct, or the fief had never been erected into a Lordſhip, and the honour had originally been perſonal. Janet, the eldeſt, aſſumed not the title. Her ſon Patrick, the noted enthuſiaſt, who in 1566 conſpired with Lord Darnley to kill Rizzio, is ſaid, indeed, to have been termed Lord Dirleton; and under this title, as well as that of Ruthven, her grandſon William, the High Treaſurer, was created Earl of Gowrie: But the dignity of Ruthven belonged unqueſtionably both to Patrick and to William; and the addition of Dirleton, which, as Dirleton had not been created a Lordſhip, ſeems not to have been a proper

ſtyle

ſtyle of Lord Halyburton, might either be given them out of a harmleſs favour, or perhaps be inſerted merely from inadvertency.—Mackenzie's Cat. p. 6. his Cond. p. 9. and his Remarks, p. 34.—Lovat's Memor. p. 31. and State, p. 12. —Sup. Caſe, p. 20.—Ad. Caſe, ch. 6. p. 86.—Brief, p. 117. and Appen. Brief, xxi.—Crawfurd's Officers of State, p. 359.—Parl. 1600. c. 2.—See p. 388. 389. 390. above.

NOTE (I), p. 211—216.

Before 1587, *territorial Honours, together with the noble fiefs, were diſpoſable by will.*

Fife. DUNCAN, the Earl of Fife who in 1346 was made priſoner at the battle of Durham, ſettled that Earldom, in default of iſſue of his body, on Allan Earl of Menteith, father of the heireſs whom the Duke of Albany married. This ſettlement, under which the Earldom ought to have deſcended to the heirs of Menteith, was afterwards confirmed by an indenture executed by Iſabel Counteſs of Fife, only child of Duncan, with Robert Earl of Menteith; and on her death the Earl of Menteith got the title as well as the eſtate. Sibbald's Hiſtory of Fife, p. 97.—Ad. Caſe, ch. 5. p. 24. —See p. 162. 163. above.

Roſs. In 1370-1, William Roſs, Earl of Roſs, obtained from David II. a charter, deviſing the Earldom of Roſs, firſt to the heirs-male of his body; next to his daughter Euphemia, and her huſband Sir Walter Leſley, and the ſurvivor of them; then to the heirs-general of Euphemia's body; laſtly, to his daughter

ter Joanna, and the heirs-general of her body; the eldeſt heir-female excluding a younger, and ſucceeding without diviſion. That charter proceeded on a reſignation, or ſettlement, made by William, and mentions not the honours; yet the title, as well as the eſtate, devolved under it to the heirs called to take them. In 1415, Eupham, Counteſs of Roſs, only child of Alexander Leſley, who had ſucceeded his father Sir Walter and his mother Euphemia, chooſing to exchange the vanities of the world, and the ſplendour of life, for the auſterities of a nunnery, or the pleaſures of retirement, made a deed, altering the former deſtination, and deviſing the Earldom, in default of heirs of her body, to John Stewart Earl of Buchan, her uncle by the mother, and the heirs-male of his body; then to Robert Stewart, the Earl's brother, and the heirs-male of his body; next to her Sovereign, and his heirs, Kings of Scotland. Under this ſettlement, in which no notice is taken of the dignity, the Earl of Buchan enjoyed both the title and the eſtate of Roſs during his life; and on his death at Vernueil in 1424, James I. took poſſeſſion of the lands, which, in conſequence of the forfeiture of Murdoc Stewart, Duke of Albany, heir-male of Robert Stewart, had devolved to the Crown. But the Earldom was afterwards granted by that Prince to Alexander, ſon of Donald Lord of the Iſles and of Margaret Leſley, daughter and heir of Lady Euphemia and Sir Walter; and the honours, as well as the fief, were poſſeſſed by Alexander, and by his ſon John, by whom both were forfeited in 1475. Ad. Caſe, ch. 5. p. 26.—Fordun, l. 16. c. 15.—Boet. l. 16. p. 354. l. 17. p. 360.—Buchanan, l. 10. c. 31. 32.—

Leſlie,

Leſlie, VII. 258.—Hawthornden, p. 25. 29.——Parl. 1476. c. 87.—Parl. 1587. c. 30.——Rymer, XI. 474, 483. &c.—See p. 170. above.

NOTE (K) p. 260.

Endeavours uſed by James I. *to improve his ſubjects.*

THE only means, by which either an accurate philoſophy or an enlarged experience permits any reaſonable hopes to be entertained, that an important change may be wrought on the manners and the morals of men, are thoſe which, attacking with prudence their prejudices and their habits, and undermining both by degrees, pierces to the roots and the ſources whence their enormities ſpring. Other remedies may afford a temporary relief, but never work radical cures. James reſolved to ſtrike deep, and by removing the cauſes or principles whoſe malignity infected their conſtitution, to extirpate, if poſſible, the diſorders with which his people were over-run.

James I. promoted induſtry,

Idleneſs, inſupportable to itſelf, as well as productive of want, vitiates the temper and excites to crimes.

encouraged agriculture,

Agriculture, therefore, and induſtry were promoted by him among the Scots. Better ſorts, than thoſe coarſe ſpecies which formed the original ſtaple of the land, are now raiſed on their farms, and perhaps are chiefly indebted for their propagation to a few uſeful experiments which that Prince directed to be tried (*q*).

improved the breed of cattle,

The material qualities of brutes; their ſize, their fatneſs, their taſte, their ſtrength, their agility, their ſkins;

(*q*) P. 30. above.

ſkins, their furs, their wool, their hair, their milk, and even their fruitfulneſs; probably depend in a great meaſure on the quantity, and the richneſs or the poorneſs of their aliment, together with the temperature of the climate in which they are reared; and it ſeems vain to expect that in an unfavourable ſoil the fineſt race will not in a few generations dwindle into that which is the natural product of the ground and of the crops raiſed on it. Nevertheleſs, an attention to their kinds is an article which ought not to be deſpiſed in huſbandry. A ſtately beaſt fills its owner with an attachment and a vanity, which, ſtimulating him to raiſe food proper for ſuſtaining its excellency, tend at leaſt in this way to the encouragement of agriculture: And the cattle and the ſheep, raiſed in a country deſtitute of ſhelter, pinched in food and ſhrivelled with cold, muſt have been not only lean and ſmall, but few in number, compared with either the wide extent of that kingdom over which they ranged, or the vaſt multitudes which care and culture might bring it to feed. A noble aſſortment of horſes and of mares, imported from Hungary by Alexander Stewart Earl of Marre, had already contributed to enlarge the ſize and to improve the breed of this ſerviceable animal (*r*): James's attention was directed to another ſpecies, and in the neighbourhood of his palace of Falkland in Fife is ſtill to be found an excellent ſort of milch cows, which are highly eſteemed, but are exceedingly ſcarce, being a rare remainder of a valuable importation made in his reign.

A

(*r*) Boet. l. 17. p. 366.—Buchan. l. 10. c. 44.—Hawthorden, p. 34.

encouraged arts and promoted manufactures,

A ſubſtantial agriculture, the ultimate ſource of all plenitude, ought, in every ſtate whoſe territories are extenſive, to form a primary object of public attention. But life cannot arrive at elegance, which adds much to its agreeableneſs, without curious arts and fine manufactures: Yet even the plain handicrafts were found by James ſtill to be either altogether unknown, or in great imperfection among his people. In order to inſtruct them, as well as to excite an emulation in their breaſts, artificers, allured by ample privileges, were brought by his care at a great expence from Brabant (*s*), and from other places on the Continent, as well as from England, to ſettle in Scotland; and the induſtrious were treated with much diſtinction by him. Not only did he take a pleaſure in diſcourſing with them on their trades: It is reported, that he condeſcended to learn a little of the more ingenious mechanical arts, and even uſed ſometimes to amuſe himſelf by working at them.

imported craftsmen and manufacturers,

reduced the exorbitant conſequence of landed property,

But other poſſeſſions will never render a nation politically happy, unleſs his perſon, his property, his liberty, and his peace, be ſecured to every citizen, without fear or even apprehenſion, againſt attacks and moleſtation: That ſecurity James determined to procure indiſcriminately to all his ſubjects. With this view, not only were wiſe laws paſſed, during his reign, for repreſſing theft and violence: A direct and bold attempt was made by him to diſſolve thoſe unruly aſſociations termed Clans, together with the impolitic conſequence proceeding from them. Leagues and bands, into which the Scots had at firſt been

(*s*) Fordun, l. 16. c. 30.—Boet. l. 17. p. 365.—Buchanan, l. 10. c. 41.—Leſlie, VII. 266. 267.—Hawthornden, p. 30.

been engaged by the barbariſm of their country to enter among themſelves for ſafety, contributing both to perpetuate and to extend the miſchiefs which had originally led to forming them (*t*), were ſtrictly prohibited by his ſtatutes (*u*). The vaſt number of attendants, by whom his grandees, from oſtentation or from fear, had uſually been accompanied (*x*), was reduced to a retinue which ſhould be decent, without being terrible or oppreſſive (*y*). An excellent police, too, was eſtabliſhed by him for the ſpeedy apprehenſion of offenders; peremptory injunctions were laid by poſitive ſtatutes on inferior magiſtrates to attend diligently to that buſineſs: And a ſuperior tribunal, called the Seſſion, was erected by Parliament, to be compoſed of the Chancellor, and of other reſpectable committees choſen from its members by the King; whoſe tranſcendent power, high dignity, and great weight, might, more ſurely and more firmly than the Juſticiary General, either ſuperſede the authority, correct the abuſes, or puniſh the partiality of the proprietary judges. This itinerant court was appointed to hold, in every year, three ſeſſions at any places which his Majeſty ſhould direct (*z*). In order to invigorate its reſolution, as well as to add force to its deciſions, his active ſpirit perſuaded the King to make a progreſs through his dominions; and on that circuit, he apprehended at Inverneſs (a borough ſituated in the heart of the depredators

(*t*) P. 61. 62. above. (*u*) Parl. 1424. c. 33.

(*x*) Pitſcottie, p. 14.—St. Dav. II. c. 11. 45.—St. Rob. III. c. 42. (*y*) Parl. 1424. c. 5.—Parl. 1427. c. 120.

(*z*) Parl. 1425. c. 72. 73. 74. 75.—Buchanan, l. 10. c. 36.—Leſlie, vii. 263.—Hawthornden, p. 30.

tors whom he was chiefly desirous to tame), and executed justice on forty leaders of those gangs, by which a considerable part of the country north of the Tay had been perpetually infested (*a*).

A principal object, towards which James's views were directed, was gained by that regal visitation. His savage Barons, amidst the stately lives led by them at a distance both from court and from town, were made sensible spectators of a higher power, whose long arm could reach them even in their own fastnesses, and, what was more mortifying, were humbled in the immediate presence of their dependents; and the inordinate importance, annexed to landed property, was not a little diminished in the imagination of his countrymen. From the great activity of the officers entrusted by him, delinquents could entertain small expectations of escaping their vigilance; and in a few years, wonderful effects were produced all over the country. Either the sentiments and the manners of the barbarians had been caused to undergo a real change, or the dread and the awe in which they stood of his virtues and of his authority, suspended for a time their wonted excesses (*b*): Even the Earl of Ross perceived that his person, though defended by several thousand followers over whom his sway was absolute, could not be safe in the distant Isles of which he was Lord; and that potent chief, the heir of the princes of the Æbudæ, obliged voluntarily to surrender himself

(*a*) Fordun, l. 16. c. 15.—Boet. l. 16. p. 360.—Major, l. 6. c. 12.—Buchanan, l. 10. c. 30.—Hawthornden, p. 25. 29.

(*b*) Fordun, l. 16. c. 33. 34—Boet. l. 17. p. 361.—Major, l. 6. c. 14.—Hawthornden, p. 29. 50. 51.

ſelf at Edinburgh, was neceſſitated there to implore clemency at the feet of his Sovereign (*c*).

In the ſtate in which Scotland was then found, every meaſure productive of thoſe effects had ſome tendency towards diſuniting dignity from lands, and indicates alſo in its promoters a diſpoſition which would reliſh their disjunction: And, perhaps, the increaſed reſpect, which began then to be ſhewn to civil accompliſhments, co-operated towards forwarding the diſannexation. A prince, whom good ſenſe rendered capable, on an impartial compariſon, of recognizing the mighty improvement derived to his own mind from literature and from contemplation, ſhocked at the brutiſh ignorance by which his ſubjects were debaſed, would be ſtudious both to diſpel the clouds that overſpread their underſtandings, and to obtain for intrinſic merit general acknowledgements of that ſuperiority which is its juſt prerogative, above an advantage merely caſual, unconnected with intellectual endowments and with moral qualities. Not only were ſchools and ſeminaries, at which philoſophy and ſcience might be learned and cultivated, founded and endowed by his munificence: Much pains was alſo taken by James on inviting into his dominions ingenious men from foreign univerſities; and, on their arrival, he was particularly attentive to diſtinguiſh them by his favour, as well as to enrich them by his bounty. Their ſtrong ſenſe afforded a repaſt more grateful to his liberal ſoul than either the boiſterous vociferation excited by ſpiritous liquors among rough Barons, or

put a high reſpect on perſonal merit,

H h the

(*c*) Fordun, l. 16. c. 16.—Boet. l. 17. p. 360.—Major, l. 6. c. 12.—Buchanan, l. 10. c. 32.—Hawthornden, p. 26.

the inſipid converſation furniſhed amidſt reſerve and ceremony by feeble courtiers: And as exterior reſpect, to which even philoſophic geniuſes are ſeldom indifferent, rarely fails to impreſs on their ſpirits an alacrity which enlivens their movements, it will not ſurpriſe your Lordſhip to hear, that he ſpent many of his vacant hours in their company, or that he ſubmitted to the diſagreeable ſervitude of attending their public exerciſes. The ſuperior eſtimation, in which perſonal merit was held by him above external advantages, was diſtinctly marked by that attention; and the familiar approaches, with which all poſſeſſed of it were admitted to the Royal preſence, raiſed them really nearer an equality with their Sovereign than thoſe, in modern times termed Peers of the Crown, whom the King did not eſteem worthy of a like intimacy.

A pride has ſometimes been reproached to Pope in affecting a contempt of Kings, or pretending to place poets on a level with them. Every prince, however, who is capable of the exquiſite feelings and creative powers which mark a genuine poet, or who perceives the extreme difficulty and great rarity of attaining excellency in that divine art, will bow with humility and with admiration to its noble productions: And James's mind was not inſenſible to the ambition and the pleaſures gathered on the hill of Parnaſſus. A few of his verſes, ſtill extant, are not a little admired by ſome of his countrymen. Buchanan obſerves, that his poems perhaps are not ſufficiently poliſhed, but that they diſcover genius (*d*).

Sub-

(*d*) Fordun, l. 16. c. 18. 30.—Boet. l. 17. p. 361. 362.—Major,

Sublime talents and extenſive acquirements are qualities in themſelves more venerable, and afford intenſer delights to the choſen few who either are bleſſed with them, or poſſeſs capacity to enter with a full ſympathy into juſt conceptions of their objects: But gentle manners and elegant behaviour, rendering thoſe adorned with them peculiarly agreeable, do not perhaps communicate leſs real happineſs to others. The ruſticity and the impurities, which James obſerved to defile a great majority of all the Scots, were exceedingly offenſive to his delicate nerves. To introduce among them habits of cleanlineſs, with which decency and neatneſs in apparel are nearly allied, a taſte for dreſs and even for finery was promoted by him among his ſubjects. Genteel faſhions, as well as rich ſtuffs, imported from foreign countries, were fondly ſtudied at his court: And balls, maſques, concerts, every ſpecies of public diverſion at which the ſexes delight to exhibit themſelves in their beſt array, were greatly encouraged, and became frequent there. Organs, which before his reign had hardly been known in Scotland, were then erected in cathedral churches, as well as in his own chapel, and cauſed to bear a part in the public worſhip. A ſenſibility of heart, united to a delicacy of ear, rendered the King paſſionately fond of muſic. His voice was uncommonly ſweet: He ſang, as well as played, on ſeveral inſtruments, with taſte and with dexterity: His muſical ſkill, and even his melodious compoſitions, are highly celebrated; and it ſeems very probable, that that pathetic art received much im-

encouraged elegant manners and polite aſſemblies.

jor, l. 6. c. 14.—Buchanan, l. 10. c. 38. 57.—Leſlie, vii. 264. 268. 269.—Hawthornden, p. 30. 31.

provement, and even acquired a new tone, in his time. Taſſoni, an Italian poet, affirms, that "James, King of Scotland, invented a muſic, plaintive and melancholy, different from every other;" a ſtyle finely adapted to ſoftening the roughneſs of his ſubjects, as well as entirely conſonant to the tenderneſs of his own breaſt (*e*).

In the helpleſſneſs of infancy, in dependence on others, in extent of abilities, in capacity of enjoyment, in pretenſions to pleaſure, in averſion to pain, in ſuſceptibility of diſtreſs, an original equality muſt be owned to ſubſiſt between all mankind, without any diſtinction proceeding from parentage, from riches, or from rank; and a humane politician, whoſe ſoft nature is feelingly impreſſed with lively ſentiments concerning that primitive equality, may ſometimes be inclined to lament inventions, whoſe undiſguiſed pride or waſteful expenſiveneſs ſeems either to inſult the miſerable creatures, or to extend the artificial diſparity, often preſented to view in the actual world: Or abſtruſe thinkers, over whoſe broken ſpirits ſevere application has diffuſed a penſive melancholy, may imagine, that the momentary amuſement, found in brilliant aſſemblies and in gaudy proceſſions, affords not an adequate compenſation for the extreme debility or diſtreſsful languor thrown by them, after a tedious, often an unſatisfied, expectation, over the fatigued nerves and exhauſted ſoul. The kindneſs, however, and the reſpect which men are obliged at leaſt

(*e*) Fordun, l. 16. c. 28. 29.—Boet. l. 17. p. 353.—Major, l. 6. c. 14.—Leſlie, vii. 266.—Buchanan, l. 10. c. 42. 57.—Hawthornden, p. 31. 36. 49. 50.—A Diſſertation on the Scotch muſic.

leaſt to affect outwardly for others, engaging them frequently to prefer their neighbours to themſelves, operate by habit; and moderating or refining ſelfiſhneſs, as well as reſtraining fierceneſs and brutality, beſtow, perhaps, ſome reality on thoſe appearances of benignity and of virtue which muſt be aſſumed by them in public: And it muſt be owned, that places of diſſipation and ſcenes of vanity, with which perſonal diſtinctions and illuſtrious titles are cloſely connected, contribute, if not under arbitrary governments to give a mildneſs to the deſpotiſm of the magiſtrate, at leaſt in barbarous ſtates to poliſh the rudeneſs of the people, and in all caſes to increaſe the brilliancy of ſociety. Much ſcandal and frequent murmurs were excited (*f*) againſt the polite entertainments or ſuperior luxury which had become faſhionable at the court of Perth, eſpecially among thoſe rigid zealots, whom a temper, tyrannical perhaps as well as envious, impelled to forbid others amuſements from which a diſſembled auſterity or affected grimace excluded themſelves. Nevertheleſs, in the wild condition in which Scotland was then placed, perhaps they were not leſs proper to be encouraged, than a rage for them ought to be reſtrained in nations advanced from civility and refinement to corruption and to folly. Not only would the roughneſs of diſcourſe, and the booriſhneſs of behaviour, which ſhock the ingenuous feelings of modeſt natures, be ſomewhat reformed in thoſe mixed aſſemblies that were patroniſed by the Scotch Queen: The increaſed demand, created by them for fine clothes and for

(*f*) Leſlie, vii. 264.— Hawthornden, p. 32.——Parl. 1429. c. 133.

other commodities, afforded much encouragement to ingenuity and to induſtry; and people of eſtate were invited from the country into town, there to mingle with their equals at public places, at which men find, that amplitude of fortune is not able, without politeneſs of addreſs, to render their company perfectly agreeable. Theatres, too, were erected, in which the ſplendour of a title might be diſplayed in ſight of the fair; and thoſe who were not poſſeſſed of an adequate extent of property, but who would ſtill be ambitious of precedency, were ſtimulated to invent a ſpecies of honour, which ſhould raiſe their perſons to a level with ſuch as derived dignity from the nobility of their lands.

The ſubſtantial advantages, derivable from wealth, operate independently both of its particular ſpecies and of the peculiar means by which it has been acquired, with an extenſive as well as mighty force on the imaginations of ſpectators; and in large cities, thoſe poſſeſſed of much money, in conſequence of the ſuperior ſplendour and greater comforts which they can afford, are often placed by it near on a juſt level with landed men. Every thing therefore, which, by improving the quality and augmenting the quantity of the fruits of the ground and of the product of labour, increaſes the riches and the independence of thoſe whoſe eſtates conſiſt in moveables, raiſing their conſideration and their pretenſions, leads towards acquiring them rank and dignity: And in thoſe, who are not lords of fiefs, honours can only be perſonal. I dare not however aſſert, that any, whoſe ſole recommendation conſiſted in perſonal fortune or even in literary

terary excellence, were actually ennobled by James. Wise monarchs always pay a great deference to established customs, on which their own power is ultimately founded, and which therefore must restrain it. But agriculture, manufactures, arts, and learning, were encouraged by him: He improved the product, the cattle, the music, and the manners of his country; imported cows, organs, artists, and philosophers: In these steps taken by him advances were silently made towards forming a nobility which should be entirely personal; and other coincidences, discoverable in his acts, are apparently connected with that innovation. P. 260—268.

NOTE (L), p. 273—276.

In ancient records are still to be found some instances, in which, perhaps, personal honours, before 1587, *descended to heirs-male, exclusively of heirs-female who, on account of propinquity, should have been preferred in the ordinary course of legal succession.—But it is probable that in these cases their fiefs either had been raised to correspondent dignities, or went to the heirs who inherited the titles.*

In 1516, Alexander Home, Lord Home, Great Chamberlain of Scotland, was executed for high treason, and his lands were then forfeited to the crown. In 1542, the forfeiture was rescinded by an act of justice in parliament, and the family was soon restored to its honours as well as to its estate. They went not, however, to Janet, Alexander's daughter, or to her heirs; but to George, his brother and heir-male. Home. 1516.

The eſtate, which probably had then been erected into a Lordſhip, and which had been deviſed to heirs-male, was granted to him. Mem. for Lord Lovat, p. 7. and his State of Inſtances, p. 2.——Sup. Caſe, p. 9.—18.—Ad. Caſe, ch. 6. p. 88.—Brief, p. 126.—Crawfurd's Officers of State, p. 324.

Gray. 1541. The title of Gray ſeems to have originally been a perſonal, as well as an ancient one: Noblemen, poſſeſſed of it in the fifteenth century, are mentioned in record; but the fief belonging to the family appears not to have been ennobled in 1524. In 1541, Patrick Gray, Lord Gray, died, leaving ſeveral daughters; and on his death the dignity deſcended to his nephew and heir-male, Patrick Gray. Indeed, the fief alſo went to him, but had not even then been incorporated into a Lordſhip. Parl. 1457. c. 68.—Lovat's State of Inſtances, p. 8.—Sup. Caſe, p. 19.—Ad. Caſe, c. 6. p. 88.—Brief, p. 126. and Append. XXV.

Fleming. 1558. James Fleming, Lord Fleming, was one of nine commiſſioners, who, in 1557, were deputed to Paris by the ſtates of Scotland (*g*) to aſſiſt, on the part of the Scots, at the nuptials of Mary, their young Queen (*h*). The noblemen employed in that buſineſs, neither condeſcending to confer on the Dauphin the honours demanded for him by the court of France, nor engaging to ſupport his pretenſions to them in the par-

(*g*) Parl. 1548. c. 4.—Parl. 1557. c. 1. 2. 3.—Keith, p. 72. &c. and his Appen. p. 18.——Buchanan, l. 16. c. 13. &c.

(*h*) Franciſci Valeſii et Mariae Stuartae, Regum Franciae et Scotiae, Epithalamium; a work of Buchanan, which, unpromiſing by its title, is little known, yet is, perhaps, the moſt claſſical poem written by any modern in the Latin language.

parliament of Scotland, their lives, it is ſhrewdly ſuſpected, were attempted with poiſon. Three of them, the Earl of Caſſillis, the Earl of Rothes, and the Biſhop of Orkney, were ſeized on their journey with ſickneſs, and died at Diepe. Lord Fleming, alarmed at their fate, returned haſtily to Paris, but ſurvived only a few days. On his death in 1558, his title, which appears to have been perſonal, deſcended not to his daughter Jean Fleming, whoſe mother, a daughter of the Duke of Chatelherault, was nearly related to the Crown, and who had herſelf married Lord Thirleſtane, Chancellor of the kingdom. The dignity went to his brother John Fleming, the Great Chamberlain, ſtill remembered for his ſteadineſs to the party of the Queen. The ancient eſtate of the family had alſo been ſettled on him by James; but ſeems ſtill to have been a barony in 1583, and was erected into the Lordſhip of Cumbernauld only in 1588: And Lady Thirleſtane, in the character of heir-general of her grandfather, took no more than Thankerton and Biggar; a parcel of land, which, probably from want of power, James could not convey, as at his death they remained ſtill veſted in the perſon of his father Malcom. Mem. for Lord Lovat, p. 10.; and State of Inſtances, p. 5.—Parl. 1593. c. 192.—Parl. 1621. c. 5.—Sup. Caſe, p. 17. 26. 28.—Ad. Caſe, ch. 6. p. 90. 112.—Brief, p. 142.—Crawfurd's Officers of State, p. 328. 329. 152.—Anderſon's Diplomata, 68.

Errol.

Moſt of the ancient Earldoms of Scotland, I believe, were territorial honours; and I dare not affirm poſitively, that the dignity of Earl of Errol was originally perſonal: Yet this title ſeems to have been conferred by

by James II. about 1455, on William Hay (*i*), High Conſtable of Scotland. The old eſtate, reported in our legends to have been beſtowed on his brave anceſtor by Kenneth III. for his gallant behaviour at the battle of Loncarty, Buchanan aſſerts, ſtill belonged, even in his days, to that reſpectable family; and in a charter granted in 1535, by James V. to George Hay of Logie-Almond, is denominated the lands and Lordſhip of Errol: But in another charter, granted in 1542 to Andrew Hay, a ſon of George, you find it deſcribed the Earldom and Barony of Errol. William Hay Earl of Errol died before 1535, and on that event his title went not to his daughter Jean Hay, but to George Hay his firſt couſin and heir-male. It is true that Andrew, ſon of George, married Jean, only child of William; and by this marriage all diſputes about the ſucceſſion muſt have been prevented or terminated. Lovat's Ad. Cond. p. 8.—Sup. Caſe, p. 18.—Ad. Caſe, ch. 6. p. 99.—Brief, p. 128.—Buchanan, l. 6. c. 33.—Boet. l. 11. p. 236. 237.

Roſs. It ſeems not to be certain, yet it is highly probable, that the dignity of Roſs of Halkhead was originally perſonal. The lands of Melvil had not been erected into a Lordſhip in 1508; and noblemen, denominated Lords Roſs, exiſted before the year 1500. In 1548, I obſerve the eſtate termed a Dominium, but dare not aſſert that a

(*i*) Hawthornden, p. 90. 95. —— Pitſcottie, p. 93. 105. —— Parl. 1457. c. 68. —— The office of High Conſtable of Scotland had been given, in 1315, to his progenitor, Sir Gilbert Hay, and his heirs, in perpetual fee, for his fidelity to Robert Bruce; Anderſon's Diplomata, N° 46. —— Dalrymple's Collections, p. 348.

a Lordſhip, or more than a Barony, is there underſtood. Ninian Roſs Lord Roſs of Halkhead had two ſons, Robert and James. The former, having been killed in 1547 at the battle of Pinkie, died before his father without male iſſue, and left a daughter Jean, whom Lord Fleming married: But, on Ninian's death, the latter ſucceeded to the title. James Lord Roſs was one of the noblemen who, in 1567, compoſed the jury on the trial of the Earl of Bothwell. His father had already executed a ſettlement, under which the Lordſhip, or lands and barony, were veſted in himſelf for life, and in James in fee. The eſtate was accordingly enjoyed by James. Lovat Mem. p. 13.—Mackenzie's Anſwers, p. 15.—Gordon Caſe, p. 13.—Sup. Caſe, p. 25.—Ad. Caſe, ch. 6. p. 94.—Brief, p. 134.—Keith, p. 377.—Note (O) below.

NOTE (M), p. 311—330.

Inſtances which tend to ſhew, that after 1587 *Peerages were deſcendible only to heirs-male.*

Angus. 1588.

ARCHIBALD DOUGLAS Earl of Angus died in 1588, leaving a daughter Eliſabeth, who did not long ſurvive him, as well as two ſiſters, Margaret and Eliſabeth, who were both married to powerful huſbands; but his Peerage went to his heir-male, Sir William Douglas of Glenbervie, a diſtant couſin. Sup. Caſe, p. 21.—Ad. Caſe, ch. 6. p. 103.—Brief, p. 130.—Ad. Cond. of Lord Lovat, p. 6.—Spotſwood, p. 372.

Hay of Yeſter. 1591.

William Hay Lord Hay of Yeſter, who died in 1590 or 1591 without male iſſue, left ſeveral daughters; but none of

of them ſucceeded to his honours. Either the Peerage became extinct on his death, and was a-new granted by the Crown to his brother James, or James took it by inheritance. Lovat Mem. p. 12.—Mackenzie's Anſwers to it, p. 13.—Lovat's State of Inſtances, p. 6.—Sup. Caſe, p. 17.—Ad. Caſe, ch. 6. p. 90.—Brief, p. 127.

Perth. 1611. James Drummond Earl of Perth died in 1611 without male iſſue, and the Peerage deſcended not to his daughter Lady Jean Drummond, whom John Earl of Sutherland married, but went to his brother John Drummond, grandfather of that nobleman who was Chancellor of Scotland during the reign of James VII. Crawfurd's Officers of State, p. 233.

Crichton of Sanquhar. Robert Crichton, Lord Crichton of Sanquhar, having employed two mean ruffians, Robert Carlyle and James Irving, to perpetrate in London a baſe aſſaſſination on John Turner a fencing-maſter, was arraigned

June 27. 1612. in the King's Bench for that atrocious murder; and having on his trial been found guilty by an Engliſh jury, the high rank of the criminal, the ſolicitous interceſſion of his friends, the ſullied honour of his family, the native partiality of his Sovereign, all availed not to prevent the completion of that which David Hume terms a laudable act of juſtice on the noble convict. Sir Francis Bacon, the celebrated philoſopher, then held the office of Attorney General, and among the works of that great man is ſtill found a diſcourſe addreſſed by him to Crichton after his conviction. In 1612 Lord Sanquhar was executed in Palace-Yard, and fortunately died without iſſue. He had indeed a ſiſter, who was married to Grierſon of Bargattan:

But

But the Peerage went to his couſin William Crichton of Rayhill. State Trials of 1612. Hume, vi. 46.—Bacon's Works.—Coke's Reports.—Lovat Mem. p. 8.—His State of Inſtances, p. 3.—Mackenzie's Anſwers, p. 7.

Roſs. 1648.

Robert (perhaps William) Roſs, Lord Roſs of Halkhead, died in 1648 without iſſue; but he left two ſiſters, Jean married to John Hepburn of Wauchton, and Mary married to Sir Henry Innes of Innes. The Peerage, however, inſtead of devolving to either of them, went to his grand-uncle and heir-male William Roſs, in whoſe deſcendants the dignity ſubſiſted till it became extinct in 1754. Lovat Mem. p. 15.—His State of Inſtances, p. 7.—Sup. Caſe, p. 17.—Ad. Caſe, ch. 6. p. 94.—Brief, p. 134.

Elphinſton. 1649.

In 1649 Alexander Elphinſton Lord Elphinſton died, leaving a daughter Lillias Elphinſton, who ſucceeded to his eſtate; but the Peerage went to his nephew and heir-male Alexander Elphinſton, on whoſe death in 1654 it was enjoyed, firſt by his eldeſt ſon Alexander till 1669, then by his next ſon John. Their mother Lillias Elphinſton, whom the ſecond Alexander had married, was alive all the time, and, if the dignity had been deſcendible to her, would have excluded them; but it was ſucceſſively poſſeſſed by each of them. They ſat in Parliament. Lovat Mem. p. 17.—Mackenzie's Anſwers to it, p. 16.—Lovat's State of Inſtances, p. 7.

Glencairn 1670.

In 1488 Alexander Cunningham Lord Kilmaurs, who at the battle of Sauchieburn commanded the left wing of the royal army, and who was killed in that affair, had been raiſed by James III. a few weeks before the action, to the higher dignity of Earl of Glencairn:

cairn: And, on the death of Alexander Earl of Glencairn in 1670 without male iſſue, the Peerage went not to his daughter Lady Margaret Cunninghame, who married an Earl of Lauderdale, and to their deſcendants; but to his brother John Earl of Glencairn, whoſe heir-male is at preſent poſſeſſed of it. Hawthornden, p. 156.—Crawfurd's Officers of State, p. 223.—Lovat's Ad. Cond. p. 22.—Sup. Caſe, p. 18.—Ad. Caſe, ch. 4. p. 64. and ch. 6. p. 107. 119.—Brief, p. 135.—Parl. 2d March 1649.

Mariſchal. 1670. William Keith, the Earl of Mariſchal, who during the civil war diſtinguiſhed himſelf by his loyalty to the King, died in 1671 without male iſſue: But he left four daughters; one, married to Sir Archibald Murray of Blackbarony; another, to Robert Viſcount of Arbuthnot; a third, to George Lord Bamff; a fourth, to Sir Edward Turner. The Peerage, however, went to his brother George, the grandfather of that Earl whom Rouſſeau honours with the appellation of friend, and of the Marechal to whom a royal author addreſſes his famous poem on immortality.—Lovat Ad. Cond. p. 11.—Crawfurd's Peerage, p. 322.

Errol. 1674. Gilbert Hay Earl of Errol died in 1674 without iſſue. On his death the Peerage went not to his ſiſter Lady Margaret Hay, who was twice married, firſt to Henry Lord Ker eldeſt ſon of an Earl of Roxburgh, next to John Earl of Caſſillis, and who had iſſue by both her huſbands; but deſcended to his couſin Sir John Hay of Killour, heir-male of the family. Either it had become extinct, and was revived by a new patent in his favour, or on a reſignation had been made

by a new grant defcendible to him. Lovat Ad. Cond. p. 10.—Lovat's Remarks, p. 10.

Morton 1681.

On the death of William Douglas Earl of Morton without iſſue in 1681, the Peerage defcended not to his ſiſter Lady Mary Douglas, who married Sir Donald Macdonald of Slate, but to his uncle and heir-male Sir James Douglas of Smithfield. Lovat Ad. Cond. p. 11.

Sempil. 1685.

Francis Sempil Lord Sempil died without iſſue in 1685, but on his death the Peerage did not go to his ſiſter Anne Sempil. Robert Sempil, heir-male of the family, muſt have been underſtood to have had a full right to it; but he ſurrendered to the Crown his pretenſions, and in conſequence of this ſurrender his Majeſty conferred the dignity on Anne Sempil by a patent, which, on a recital of the conſent and the reſignation of Robert Sempil, confirms a ſettlement of the honours as well as of the eſtate, which had been made by her father in favour of her and of her heirs-male. Nevertheleſs, an heir-male, who ſeems not to have acquieſced in their right, but claimed the Peerage, and even carried the title, ſtill exiſted in 1729. Lovat's Memor. p. 39.—Lovat's State of Inſtances, p. 14.—Gordon Appen. p. 14.—Sup. Caſe, p. 18.—Ad Caſe, ch. 6. p. 95. 114. 124.——Brief, p. 124.——Appen. Brief 6.

Lauder dale. 1710.

John Maitland Lord Maitland died in 1710, leaving an only child Jean; but on the death of his father John Earl of Lauderdale, who had ſurvived him, the dignity deſcended to his uncle Charles, next brother and heir-male of the laſt poſſeſſor of it, whoſe ſon, James, is now Earl.

On

Wigton. 1743. On the death of John Fleming Earl of Wigton without iſſue male in 1743, both his eſtate and his honours went to his brother and heir-male Charles, not to his daughter Lady Clementina Fleming. Append. 2d to Gordon Caſe.

NOTE (N), p. 330—341.

Caſes in which Peerages, territorial or perſonal, ſeem to have become extinct, becauſe no heir-male, deſcended of the Noblemen who had poſſeſſed them in the year 1587, *was in exiſtence at the devolution of the ſucceſſion, and to have been re-created, in ſome inſtances, by new patents granted to the proper heirs of them.*

Hay of Yeſter. 1591. William Hay Lord Hay of Yeſter, who died in 1591 without male iſſue, left ſeveral daughters. Probably, however, the Peerage was underſtood on his death to become extinct. The eſtate in 1590 had been erected into a Lordſhip, and deſcended to his brother James Hay: But that was then held not to enoble him, and the dignity ſeems to have been anew conferred on James. Mackenzie's Anſwers, p. 13.—See note (M).

Athole. 1594. On the death of John Stewart Earl of Athole, who died in 1594 without male iſſue, but who left four daughters, the Peerage became extinct; and, by a new patent, was granted in 1595 to John Lord Innermeath, a nobleman who by lineage had no pretenſions to it. P. 321.

Buchan. 1601. Perhaps the only inſtance of an honour originally territorial, which after 1587 deſcended to an heir-female,

is

is the ancient Earldom of Buchan, and even that inſtance is not perfectly unambiguous. James Douglas Earl of Buchan, who died about 1601, left an only child Mary Douglas. This Lady was then an infant, but had a good right to the eſtate. Hence thoſe who managed her affairs, during her minority, aſſumed for her the title of Counteſs of Buchan: Under that title her inveſtiture was completed in the Earldom: And Stewart of Traquair, the heir-male, who had ſprung from the family before 1587, forebore to aſſert a claim to the honours. Her pretenſions, however, ſeem not to have been altogether unqueſtioned. In 1617 her huſband James Erſkine, a younger ſon of the Earl of Marre, who was Lord High Treaſurer of Scotland, had the precaution to take from the Crown a charter, by which the Peerage as well as the eſtate, together with the privileges belonging to it, is granted to him under the royal hand: On account of his connection with the heireſs of the family, he had ſome natural claim to poſſeſs the honours belonging to it: And it is remarkable that they are not there limited to her heirs, but deviſed to the heirs-male of James Erſkine the Earl. Not a word in favour of the heirs-male either of the Douglaſſes or of the Stewarts, the ancient Earls of Buchan, who, one ſhould almoſt imagine, had even then been perceived not to poſſeſs any right to the dignity. Sup. Caſe, p. 32.—Ad. Caſe, ch. 5. p. 63. —Brief, p. 110.—P. 180. 213. above.

Andrew Gray Lord Gray had an only child, Anne, who, with the conſent of her father, married William Gray of Pittendrum about 1628; and, on Lord Gray's death, the Peerage ſhould have become extinct for Gray.

want of heirs of the blood entitled to inherit it. Hence, on his Lordſhip's application, King Charles I. granted a new patent, conferring the dignity on William Gray and his heirs-male by Anne Gray, after the death of her father, together with the title and the rank of Maſter of Gray before it. Sup. Caſe, p. 19.—Ad. Caſe, ch. 6. p. 93.—Parl. 1641. c. 248. 270. (not printed.)

Lennox. 1672.

On the death of Charles Stewart Duke of Lennox without iſſue in 1672, the dignity went not to his ſiſter Lady Catherine Stewart wife of Lord Obrien, but, merging in the Crown, became extinct. See p. 323. above.

Borthwick. 1672.

John Lord Borthwick, who died in 1672, left heirs-female deſcended of his father; but they did not pretend to the Peerage. His heirs-male, too, who were ſprung from the family before 1587, did not claim it, and the dignity was long underſtood to be extinct. A claim, indeed, entered at the diſtance of fourſcore years, by Henry Borthwick Eſquire, was adjudged by the Houſe of Lords in 1762 to be good; and I muſt forbear to inveſtigate either the truth of the facts, or the ſolidity of the principles, on which, without a competitor, his pretenſions were maintained. P. 330. above.

Sinclair. 1676.

In 1676 John Lord Sinclair died without male iſſue; but he left a daughter, Catherine, to whom the Peerage did not go. The dignity became extinct; and in 1677 Charles II. by a new patent, promoted her ſon Henry Sinclair to the honour of Lord Sinclair. Lovat Mem. p. 38.—His State of Inſtances, p. 15.—Mackenzie's Remarks, p. 36.—Caſe exhibited to the

Houſe

Houſe of Lords in 1783, on behalf of Charles Sinclair, claimant of the Peerage of Sinclair.—See p. 435. above.

The dignity annexed to the Earldom of Menteith was deſcendible in old times to heirs-female. Towards the end of the ſeventeenth century, the family which had laſt held it failed in the perſon of William Graham Earl of Menteith; but genealogiſts affirm that heirs-male, deſcended from its ancient Lords before the year 1587, are ſtill in being: The Peerage, however, has not been claimed by any of them, and is commonly ſuppoſed to be extinct. CRAWFURD.—DOUGLAS. Menteith, 1694.

On the death of Charles Fleming Earl of Wigton without iſſue in 1747, the eſtate went to his niece Lady Clementina Fleming; but the Peerage deſcended not to her, and is generally ſuppoſed to have become extinct. Wigton, 1747.

William Roſs Lord Roſs of Halkhead died without iſſue in 1754; but left three ſiſters, of whom the eldeſt ſucceeded both to the fief of Halkhead and to the eſtate of Melvil. The Peerage became extinct. Roſs, 1754.

NOTE (O), p. 427.

Noblemen triable by Commoners.

THE jury which ſat in 1425 on the trial of the Duke of Albany, of the Earl of Lennox, and of the ſons of the Duke, conſiſted of the following perſons, of whom ſeveral were commoners: "Quorum viciſſim una Jury empanelled on the trial of the Duke of Albany in 1425.

una et eadem affiſſa fuerunt, Walterus Stewart de Athole patruus Regis, Archibaldus tertius hoc nomine de Douglas, Alexander Stewart de Marre, Willielmus Douglas de Angus, Willielmus de Sancto Claro de Orkney, Alexander Inſularum de Roſs, et Georgius de Dunbar Marchiae, COMITES; Jacobus Douglas de Balvany, et Robertus Stewart de Lorn, DOMINI; Johannes de Montegomorri ejuſdem, Gilbertus de Hay de Errol conſtabularius Scotiae, Thomas Somerville ejuſdem, Herbertus Herrice de Terreglez, Jacobus de Douglas de Dalketh, Robertus Conyngham de Kylmauris, Alexander Levynſton de Kalendar, Thomas Hay de Lochorwart, Willielmus Borthwich ejuſdem, Patricius Ogilvie vice-comes de Angus, Johannes Forreſter de Corſtorphin, et Walterus Ogilby de Lunchrethin, MILITES." Fordun, l. 16. c. 10.—Major, l. 6. c. 12.—Sir George Mackenzie's Works, ii. 275.—Crawfurd Officers of State, p. 310.

Lord Lile, in 1481.

In 1481, Robert Lord Lile was tried in "a Parliament of King James III. holden at Edinburgh 18th March 1481.—22 Martii, quinto die Parliamenti, Domino Rege ſedente in trono Juſtitiae—Aſſiſſa: Comes Atholiae, Comes de Morton, Dominus Glammis, Dominus Eiſkine, Dominus Oliphant, Dominus Cathkert, Dominus Gray, Dominus Borthwick, Dominus de Stobhall, Dominus de Drumlanrig, Dominus Maxwell, Willielmus Borthwick Miles, Alexander Magiſter de Crawfurd, Silveſter Rattray de eodem, Robert Abercrommy de eodem Miles, David Moubray de Barnbougle Miles.—Accuſatio ſuper Roberto domino Lile per Rotulos, ut ſequitur. Robert Lord Lile, you are delated to the King's highneſs, that you have ſent letters

ters in England to the traitour James of Douglas, and to other Engliſhmen, in treaſonable manner, and alſo received letters from the ſaid traitour and from other Engliſhmen in treaſonable manner, and in furthering of the King's enemies of England, and prejudice and ſkaith to our Sovereign Lord the King, his realm and lieges.—Quae aſſiſa ſupraſcripta, in preſentia ſupremi Domini noſtri Regis jurata, et de ipſius Mandato ſuper dictam accuſationem cognoſcere per eundem ſupremum dominum noſtrum Regem mandata, remota et re-intrata, deliberatum eſt per os JOANNIS DRUMMOND DE STOBHALL, nomine et ex parte dictae aſſiſſae et prolocutorio nomine ejuſdem, dictum Robertum dominum Lile quietum fore et immunem et innocentem accuſationis et calumniationis ſupraſcriptae: Super quibus dictus Robertus dominus Lile petiit notam Curiae Parliamenti, et teſtimonium ſub magno ſigillo ejuſdem domini Regis, ſibi dari ſuper praemiſſis; quod quidem teſtimonium idem dominus Rex ſibi conceſſit, darique mandavit eidem in forma ſuperſcripta et conſueta." Appendix to Hiſtorical Law Tracts.

In 1567 the Earl of Bothwell was tried for the murther of Henry Stewart Duke of Roſs, huſband of Queen Mary, by a jury conſiſting of, Andrew Earl of Rothes; George Earl of Caithneſs; Gilbert Earl of Caſſillis; Lord John Hamilton, commendator of Arbroth, ſon to the Lord Duke; James Lord Roſs; Robert Lord Semple; John Maxwell Lord Herries; Laurence Lord Oliphant; John, Maſter of Forbes; John Gordon of Lochinvar; Robert Lord Boyde; James Cokburne of Lantown; John Somerwel of Cambuſnethan; Moubray of Barnbougal; Ogilvie of Boyne. Anderſon's The Earl of Bothwell, in 1567.

Collections, ii. 112.——Spotswood, p. 201.——Keith, p. 375. 376. 377.

The Earl of Morton, in 1581.

In 1581 the Earl of Morton, who had been Regent of Scotland, was tried by a jury, of which the Laird of Wauchton made one. Crawfurd's Officers of State, p. 115.

The Earl ofGowrie, in 1584.

In 1584 William Ruthven Earl of Gowrie, himself a conspirator, and son of one as well as father of another, was tried at Stirling before John Graham, a justice, by a jury consisting of the Earls of Argyle, Crawford, Montrose, Glencairn, Eglinton, Arran, and Marischal; of Lords Seton, Somervel, Doun, Livingston, Drummond, Ogilvie, and Oliphant; and of Murray of Tullibairden. Cromarty's Account of Gowrie's Conspiracy, p. 13.——Crawfurd's Officers of State, p. 390.—Parl. 1584. c. 18.

Lord Balmerino, in 1609.

In 1609 James Lord Balmerino, a Secretary of State, was tried before the Justice General, and found guilty by a jury, which consisted of David Earl of Crawford, George Earl of Marischal, John Earl of Wigton, Patrick Earl of Kinghorn, John Earl of Tullibairdin, Allan Lord Cathcart, John Lord Salton, David Lord Scoone, Alexander Lord Garlies, William Master of Tullibairdin, Sir James Douglas of Drumlanric, Sir Robert Gordon of Lochinvar, Sir William Livingston of Kilsyth, Sir John Houston of Houston, and Sir Patrick Hume of Polwarth. Spotswood, p. 511.

Earl of Orkney, in 1614.

Patrick Stewart Earl of Orkney was tried in the Court of Justiciary for a rebellion raised by him in those islands, and was found guilty by a jury consisting of James Earl of Glencairn, George Earl of Winton, John Earl of Perth, Robert Earl of Lothian, William

liam Earl of Tullibairdin, David Lord Scoone, William Lord Sanqhar, John Lord Herries, James Lord Torphichen, Hugh Lord Semple, William Lord Kilmaurs, John Grant of Freuchie, Sir Patrick Hepburn of Wauchton, Robert Arnot of Ferny, and Sir Henry Lindſay of Kinſauns. Spotſwood, p. 520.—See Burnet, I. 26. 32.

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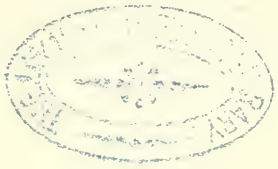
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